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No. 05-6

In The
Supreme Court of the United States

BRUCE W. CATTELL, Warden,

Petitioner,

v.

DELVIN WHITE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

KELLY A. AYOTTE
Attorney General
State of New Hampshire

STEPHEN D. FULLER
Senior Assistant Attorney General
Counsel of Record

NICHOLAS CORT
Assistant Attorney General

N. H. DEPT. OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3671

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Did the First Circuit exceed its authority under 28 U.S.C. § 2254(d) when it held that the New Hampshire Supreme Court was objectively unreasonable in holding that a defendant's Confrontation Clause rights were not violated when the trial court refused to allow him to present evidence that his sexual assault victims had made prior false allegations of sexual assault – without any showing by the defendant that such impeachment would show bias or motive?

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PETITION FOR WRIT OF CERTIORARI

Bruce W. Cattell, Warden, New Hampshire State Prison (hereafter Warden) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005), Appendix A (hereafter *White*), and was amended by an "errata" order issued March 17, 2005, Appendix B. The order denying rehearing is unreported, Appendix F. The order of the district court denying habeas corpus relief is reported at *White v. Coplan*, 296 F.Supp.2d 46 (D.N.H. 2003), Appendix C. That order reversed and withdrew the district court's previous order, which was reported at 270 F.Supp.2d 178 (D.N.H. 2003), Appendix D.

The opinion of the New Hampshire Supreme Court is reported at *State v. White*, 765 A.2d 156 (N.H. 2000), *cert. denied*, 533 U.S. 932 (2001), Appendix E.

BASIS FOR JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the First Circuit on February 18, 2005. Appendix A. The same Court denied the Warden's motion for rehearing and for rehearing en banc on March 25, 2005. Appendix F. The jurisdiction of

this Court is timely invoked under 28 U.S.C. § 1254(1). *See* Sup. Ct. R. 13.3.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

28 U.S.C. § 2254(d) provides in part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

INTRODUCTION

In *Davis v. Alaska*, 415 U.S. 308 (1974), this Court discussed the extent to which the Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to impeach a witness through cross-examination. The defendant in that case had been convicted of burglary and grand larceny, based largely on the testimony of a 17-year-old boy. This Court overturned the convictions because the

trial court had prevented the defense from asking the witness about his status as a juvenile probationer. *Id.* at 320-21.

This Court described two distinct types of cross-examination intended to

> impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of a witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Id. at 316-17. Because the witness's status as a probationer made him vulnerable to "undue pressure" from the authorities, *id.* at 318, and was therefore relevant "to show the existence of possible bias or prejudice," *id.* at 317, this Court held that

> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right

> as the effective cross-examination *for bias* of an adverse witness.

Id. at 320 (emphasis added).

Justice Stewart, concurring, reiterated that the holding was based on the need for cross-examination "to show the existence of possible bias and prejudice," and then said:

> In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination. . . .

Id. at 321 (Stewart, J., concurring).

Since *Davis* was decided, several federal courts of appeals besides the First Circuit have addressed the issue of whether a defendant accused of sexual assault has the right under the Confrontation Clause to introduce evidence that his accusers had previously made false accusations. Each of them concluded that the rule of *Davis* tracks Justice Stewart's understanding: the Confrontation Clause protects the right to impeach adverse witnesses on their bias and motive, but not their general credibility. *Redmond v. Kingston*, 240 F.3d 590, 592-93 (7th Cir. 2001); *Boggs v. Collins*, 226 F.3d 728, 738 (6th Cir. 2000), *cert. denied*, 532 U.S. 913 (2001); *United States v. Bartlett*, 856 F.2d 1071, 1089 (8th Cir. 1988); *Hughes v. Raines*, 641 F.2d 790, 792-93 (9th Cir. 1981).

Accordingly, these courts held that the Confrontation Clause was violated only where the defendant was able to show that the prior false accusation was probative of a specific motive or bias in the particular case. *Redmond*,

240 F.3d at 591-92 ("Redmond wanted to bring out [the accuser's previous] lie on cross-examination in order to show that [she] would lie about a sexual assault in order to get attention, and thus had a motive to accuse him falsely"). The decision of the New Hampshire Supreme Court in this case was consistent with this construction.

STATEMENT OF THE CASE

I. Trial and Appeal

The evidence in support of the Respondent's (hereafter "White's") convictions is set out in the opinion of the New Hampshire Supreme Court:

> In March, 1996, [White] spent an afternoon visiting a friend and his girlfriend at their apartment in Manchester. The friend had two daughters, ages twelve and eight, and the girlfriend had two sons, all of whom were together at the apartment that day. After spending the afternoon playing cribbage, listening to the radio, and drinking beer with his friend, [White] accepted an invitation to stay for dinner. It was later agreed that he would spend the night.
>
> At trial, the younger daughter testified that while she sat with [White] on a day bed watching television, he rubbed her breasts, put his hands down her pants, and "stuck his finger in." When the daughter told her father what had happened, he attacked [White]. During this confrontation, the older daughter came out of a bedroom crying hysterically. She later related that earlier that same day [White] had touched her breasts, her vaginal area, and inserted his finger in her "private." As the confrontation between the father

> and [White] continued, the father's girlfriend took all of the children to a neighbor's apartment and called the police. After an investigation, the police told her to take the victims to the hospital for a physical examination, and she did so.
>
> [White] was convicted of aggravated felonious sexual assault against the older child and one count of felonious sexual assault against each child.

App. 47-48.

Prior to trial, White sought to introduce evidence of prior accusations of sexual abuse made by both daughters, asserting that the prior accusations were false and therefore relevant to the victims' credibility. In support of his motion, White made the following proffer: When the younger daughter, Melissa, was five years old, she reported having been sexually abused by a neighbor, Roger Houston. She initially described to the police several instances of abuse, including an incident when Houston made her touch his penis. When re-interviewed by the police some time later, Melissa stated that she had not touched his penis and could not remember if he had asked her to do so. However, she did not contradict her earlier statement concerning the other instances of abuse. Around the same time period, the older daughter, Mandy, reported that Houston "French kissed" her. Houston was ultimately acquitted of assaulting both girls. During the Houston trial, there was testimony that Mandy later denied the kissing incident took place. Also during trial, the victims' baby-sitter, Peggy Lemear, testified that Mandy told her she had been molested by her cousin Jeremy and a man named Mac. Lemear stated that Mandy later told her the allegations against Jeremy were untrue.

In support of its objection to White's motion, the State proffered that Mandy's denial of the French-kissing incident came only after her mother and her mother's boyfriend confronted her, accused her of lying, and created a coercive atmosphere that caused her to recant. She later reinstated her initial accusations. In addition, the State asserted that Ms. Lemear's testimony concerning Mandy's recantation of the accusation against her cousin was less than credible because Lemear had made contradictory statements on several occasions. With respect to the accusation against Mac, the State noted that the defense had not offered any evidence, either during the Houston trial or in its motion, indicating that that allegation was fabricated, contested, or recanted.

The trial court denied White's motion. It found, in relevant part, that White had not established that the girls' prior accusations were demonstrably false and therefore had failed to satisfy the requisite threshold showing that evidence was probative of untruthfulness, as required under New Hampshire Rule of Evidence 608(b) ["Rule 608(b)"].[1]

White challenged that ruling on appeal. He argued, *inter alia*, that the lower court applied an incorrect standard in determining whether the evidence was admissible under Rule 608(b). He also claimed that the

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[1] N.H. R. Evid. 608(b) provides, in relevant part, that "[s]pecific instances of the conduct of a witness, for the purpose of attacking . . . the witness' credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness. . . ."

ruling violated his right to present evidence and confront witnesses against him, as guaranteed by part I, article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. App. 49, 57.

The New Hampshire Supreme Court affirmed the lower court's ruling. It interpreted "demonstrably false" to mean "clearly and convincingly untrue" and expressly adopted that standard as the requisite threshold showing for admissibility of prior allegedly false allegations of sexual abuse under Rule 608(b). *Id.* at 50. Applying that standard, it concluded that the lower court did not abuse its discretion in denying White's motion. *Id.* at 50-55. The court also rejected White's state constitutional claims, holding that "the prior allegations of sexual assault are not probative of the victims' motives. . . . " *Id.* at 58. It expressly declined to perform a separate analysis of the federal claims, holding that "federal law does not provide any additional protection in this area." *Id.*

White then petitioned this Court for a writ of certiorari, arguing that application of the "demonstrably false" standard was an infringement of his rights under the Confrontation Clause of the Sixth Amendment. The State objected, citing Justice Stewart's concurrence in *Davis*, and the federal appellate cases applying *Davis*, for the proposition that the Confrontation Clause has never been construed to require that a criminal defendant be permitted to attack a witness's general credibility by pointing to instances of past conduct. This Court denied certiorari on June 25, 2001. *White v. New Hampshire*, 533 U.S. 932 (2001).

II. Petition for Habeas Corpus

White filed a petition for habeas corpus relief against the Warden[2] in the federal district court for the District of New Hampshire, again arguing that the "demonstrably false" standard was unconstitutional. The Warden moved for summary judgment, citing *Davis*, as well as *Boggs*, *Bartlett*, and *Hughes*. White objected, urging the court to reject the distinction recognized by the Sixth, Eighth, and Ninth Circuits "because it deviates from the teaching of the majority opinion in *Davis*."

The district court (*Muirhead*, M.J.) issued an order denying the Warden's motion and granting the petition. While conceding that "White has not articulated a particular motive theory," App. 42, the court held that "this is an extreme case where the state court's restriction on the defendant's right to cross-examination was manifestly unreasonable and overbroad," App. 43.

The Warden filed a motion to alter judgment under Fed. R. Civ. P. 59(e), and the district court granted the motion, withdrawing its previous order and issuing a new order denying the writ. Appendix C. White then appealed to the First Circuit, urging the Court to hold (1) that the deferential standard of review in 28 U.S.C. § 2254(d) was not applicable, and (2) that the distinction between cross-examination for motive or bias and cross-examination for general credibility, as set out in Justice Stewart's concurrence in *Davis*, and as adopted in *Boggs* and similar cases, was "an erroneous characterization of *Davis*'s central

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[2] At the time White's petition was filed, Jane Coplan was the Warden of the New Hampshire State Prison. Bruce W. Cattell assumed that post in September 2004.

holding." He argued that attacks on general credibility were constitutionally protected where they have "great probative value," such as prior accusations (proven to be false by a reasonable probability) similar to those in the case at bar, even though "such evidence may not, in itself, reveal a specific motive to lie. . . ."

The First Circuit reversed the district court. It held that deferential review was appropriate, App. 8-9, and acknowledged that "'general credibility' evidence, . . . under confrontation clause standards, may have a lower status" than "[e]vidence suggesting a motive to lie," App. 14 (citing Justice Stewart's concurrence in *Davis*). Nevertheless, it held that the excluded cross-examination here was "far more potent than 'general credibility' evidence," *id.*, because of the similarities it found between one of the allegedly false prior accusations and the accusations made by the victims against White, App. 11.

The Court concluded, without citing any authority, that "[i]f the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive (although without pinpointing its precise character)." *Id.* Based on that reasoning, the Court rejected the decision denying the writ and held that:

> There is no Supreme Court case directly on all fours, but AEDPA requires no such thing. It is enough if the Supreme Court's general principles can be discerned and if, respectfully but with confidence, we think that failure to allow the evidence on the facts before us would be an unreasonable application of those principles. We do so conclude in this case. . . .

App. 13.

REASON FOR GRANTING THE WRIT

THE FIRST CIRCUIT FAILED TO ADHERE TO THE LIMITS IMPOSED BY AEDPA ON FEDERAL HABEAS CORPUS REVIEW

Although the First Circuit acknowledged that the New Hampshire Supreme Court's decision in this case is subject to the deferential standard of review established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), App. 8-9, it failed to adhere to that standard when it granted the writ. The decision of the New Hampshire Supreme Court was entirely consistent with this Court's clearly established jurisprudence on the Confrontation Clause, because it expressly held that the prior accusations at issue in this case were not probative of the victims' motives.

Under the AEDPA standard, the writ of habeas corpus could not be granted unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court]." 28 U.S.C. § 2254(d)(1). An unreasonable application is one that is "objectively unreasonable," *Williams v. Taylor*, 529 U.S. 362, 409 (2000), and surpasses "clear error," *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).

Of course, as this Court has held and the First Circuit implicitly recognized, "Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Id.* at 76; App. 13. However, this Court has also recently held that

> the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal

> rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 541 U.S. 652, ___, 158 L.Ed.2d 938, 951 (2004).

In *Alvarado*, the rule under consideration was the test for when a person is in custody for *Miranda* purposes. *Id.*, 158 L.Ed.2d at 949. This Court noted that it had addressed this question on numerous occasions. *Id.* at 949-51 (citing *Oregon v. Mathiason*, 429 U.S. 492 (1977); *California v. Beheler*, 463 U.S. 1121 (1983); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Stansbury v. California*, 511 U.S. 318 (1994); *Thompson v. Keohane*, 516 U.S. 99 (1995)). Nevertheless, it found that the rule established by those cases – essentially, whether a reasonable person in the defendant's position would "have felt he or she was not at liberty to terminate the interrogation and leave" – was sufficiently general that "fair-minded jurists could disagree over whether Alvarado was in custody." *Alvarado*, 158 L.Ed.2d at 951 (quotation omitted). This Court accordingly reversed the Ninth Circuit's granting of habeas relief. *Id.* at 954.

The issue in the instant matter is the extent to which the Confrontation Clause guarantees a defendant the right to cross-examine a sexual assault victim regarding prior

accusations of sexual assault. While this Court has addressed the scope of the Sixth Amendment right to confrontation, *see Michigan v. Lucas*, 500 U.S. 145 (1991); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Davis, supra*; *Pointer v. Texas*, 380 U.S. 400 (1965), it has never addressed this specific issue. Without specific guiding precedent, the First Circuit applied the broad rule set forth in *Lucas*, that "restrictions on the defendant's rights 'to confront adverse witnesses and to present evidence may not be arbitrary or disproportionate to the purposes they are designed to serve.'" App. 10 (quoting *Lucas*, 500 U.S. at 151; internal quotation omitted). As the Circuit Court acknowledged, this rule is general in nature. *Id.* However, the Court applied it in a way that is not supported by this Court's precedents, that failed to give sufficient "leeway" to the state court's holding, and that has been rejected by at least one other circuit.

In *Boggs,* the habeas petitioner was challenging a state court ruling that precluded him from cross-examining the victim in his sexual assault trial about her alleged prior false accusations of sexual abuse. He had asserted that the evidence was critical to impeach the victim's credibility. The federal district court granted the writ on the ground that the proposed cross-examination was "not . . . a general attack on the victim's credibility but rather [was intended] more particularly to . . . expose her motives and state of mind as related directly to the rape charge at hand." *Boggs*, 226 F.2d at 740. The Sixth Circuit rejected this "semantic distinction," *id.*, because

> an articulated theory that a witness had a motive to fabricate lay at the heart of the *Davis* and *Van Arsdall* defenses . . . [, while] nowhere in the briefs or prior phases of this case has Boggs articulated a

> similar motive-based theory. Rather, his argument explicitly hinges on [the victim's] general credibility. Simply labeling this general credibility argument to be one of "motive" without articulating a theory of motive or partiality does not implicate the rights carefully outlined in *Davis*.

Id. at 741.

The *Boggs* Court relied on the distinction drawn by this Court in *Davis*, made explicit in Justice Stewart's concurrence in that case, and previously applied by the Eighth and Ninth Circuits, "between an attack on the general credibility of the witness and a more particular attack on credibility through revealing biases, prejudices, or ulterior motives." *Boggs*, 226 F.3d at 738 (citing *Hughes*, 641 F.2d at 793; *Bartlett*, 856 F.2d at 1088-89); *Davis*, 415 U.S. at 316-17. All three circuits concluded that the former "purpose – and the inference that because the victim made a false accusation in the past, the instant accusation is also false – fell below the Sixth Amendment threshold." *Boggs*, 226 F.3d at 738.

As in this case, the defendant in *Boggs* had "repeatedly underscore[d] the importance of the prior accusation in diminishing [the victim's] general credibility." *Boggs*, 226 F.3d at 739; *see White*, App. 12-13 ("White had almost no way to defend himself except by impeachment. . . . [C]ross-examination to show prior similar accusations by the girls, allegedly recanted in two of the three instances, could easily have changed the outcome"). The *Boggs* Court held that

> this emphasis on [the victim's] general credibility overlooks the fundamental distinction drawn in *Davis* and *Van Arsdall*. No matter how central an

> accuser's credibility is to a case – indeed, her credibility will almost always be the cornerstone of a rape or sexual assault case, even if there is physical evidence – the Constitution does not *require* that a defendant be given the opportunity to wage a general attack on credibility by pointing to individual instances of past conduct. . . . Under *Davis* and its progeny, the Sixth Amendment only compels cross-examination if that examination aims to reveal the motive, bias, or prejudice of a witness/accuser.

Boggs, 226 F.3d at 740 (emphasis in original).

Similarly, in this case White never articulated a motive-based theory for the proposed line of cross-examination. His sole stated purpose was to impeach the victim's general credibility, which was clearly a central issue in this case. Having failed to pursue a motive-based theory, under the reasoning of the Sixth Circuit, White had no constitutional right to wage the desired attack on the victim's credibility.

The First Circuit attempted to distinguish *Boggs* by pointing to the trial court's finding in *Boggs* (long after the defendant's conviction, when the case had been reversed and remanded twice) that the victim in that case had never actually made prior accusations. App. 14 (citing *Boggs*, 226 F.3d at 735). This analysis completely overlooks the fact that, in *Boggs*, the Sixth Circuit took no account of the strength of the evidence, but based its holding solely on the purpose for which that evidence was offered. There is no reason to doubt that the holding would have been identical even if the evidence for falsity in *Boggs* had been stronger than the evidence in this case.

The *Boggs* holding is accordingly in direct conflict with that of the First Circuit.

The First Circuit did attempt to bring this case into the category of "motive or bias" evidence described in *Davis*, but could only do so by advancing a novel theory. Despite the absence of any motive-based theory of relevance for the proposed cross-examination in the lower court record, the First Circuit nevertheless characterized it as such. The Court pointed to similarities between the charges against White and one of the prior allegations made by the younger victim, App. 11, and theorized that:

> the nature of the motive may be unknown; but if the prior accusations are similar enough to the present ones and shown to be false, a motive can be inferred and from it a plausible doubt or disbelief as to the witness' present testimony.

App. 14. In other words, the existence of similarities between two or more lies is, in and of itself, evidence of a common underlying motive, notwithstanding the dearth of any evidence of a nexus between the incidents. Questioning a witness about such incidents would thus qualify as cross-examination aimed at revealing possible motive.

The theory propounded by the First Circuit finds no support in the precedent of this Court. To the contrary, it blurs the distinction between the two categories of cross-examination recognized in *Davis*, while expanding the boundaries of the category of cross-examination directed at revealing motive or bias to such an extent that it has no meaning.

Even if this Court were to find merit in the First Circuit's logic, the First Circuit's holding would constitute a divergence from clearly established federal law. To

conclude that the state court decision was an unreasonable application of federal law, based on this newly articulated theory, fails to give the state court the deference to which it is entitled under the AEDPA standard. *See Taylor,* 529 U.S. at 412 ("Sec. 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence"). It was not unreasonable for the New Hampshire Supreme Court not to devise a rule that the existence of similarities between prior false accusations and the current accusation in itself evinces a motive to lie, even where a defendant himself could not posit a motive or bias on the accuser's part. There is nothing in the facts of this case that could reasonably bring the proposed cross-examination here into the *Davis* Court's carefully delineated category of "cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis*, 415 U.S. at 316.

In finding the state court's decision unreasonable, the First Circuit relied heavily on *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001), a case in which the Seventh Circuit reversed the district court and ordered habeas relief because the state court had excluded evidence of prior false accusations. App. 13-14. This reliance was misplaced. Unlike the instant case, the *Redmond* Court expressly found that the evidence of prior accusations was relevant to a specific motive – the alleged victim's desire to get her mother's attention. *Redmond*, 240 F.3d at 591-92.

The *Redmond* Court distinguished *Bartlett* and *Hughes*, saying:

> They are cases in which the defendant wanted to use the falsity of the [prior] charges to demonstrate that the complaining witness was a liar,

> rather than to demonstrate that she had a motive to lodge a false accusation against the defendant. The use of evidence that a person has lied in the past to show that she is lying now is questionable, . . . since few people, other than the occasional saint, go through life without ever lying, unless they are under oath. The probative value of such evidence when used for such a purpose is small and may be outweighed by the prejudicial effect of revealing that the witness had made such a serious charge falsely.

Redmond, 240 F.3d at 593 (citations omitted).

The Seventh Circuit held that the facts in *Redmond* were closer to those in *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam). *Redmond*, 240 F.3d at 592-93. In *Olden*, this Court reversed the defendant's conviction because, after raising the defense of consent to a charge of sexual assault, he had been prevented from introducing evidence that the complaining witness was romantically involved with the only corroborating witness, which would have revealed both the latter's possible bias and the complaining witness's motive for lying to him and to the police about the alleged assault. *Olden*, 488 U.S. at 229-33.

No such theory of motive or bias was advanced here. It is therefore apparent that this case has little in common with *Redmond*, but is squarely in the category of those cases distinguished by the Seventh Circuit, where "the defendant wanted to use the falsity of the [prior] charges to demonstrate that the complaining witness was a liar, rather than to demonstrate that she had a motive to lodge a false accusation against the defendant." *Redmond*, 240 F.3d at 593.

Because this Court has never held that the Sixth Amendment requires the admission of evidence that a witness lied previously to show that she is lying now, it follows that the decision of the New Hampshire Supreme Court was not an unreasonable application of clearly established Federal law, as determined by this Court. Therefore, this Court need not directly address the clear split between the circuits outlined herein. It need only hold that the First Circuit exceeded the limits of deferential review established by 28 U.S.C. § 2254(d)(1), and reinstate the order of the district court denying White's petition for habeas relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KELLY A. AYOTTE
Attorney General
State of New Hampshire

STEPHEN D. FULLER
Senior Assistant Attorney General
Counsel of Record

NICHOLAS CORT
Assistant Attorney General

N. H. DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3671

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APPENDIX A

United States Court of Appeals For the First Circuit

No. 04-1044

DELVIN WHITE, Petitioner, Appellant,

v.

JANE COPLAN, WARDEN, NEW HAMPSHIRE STATE PRISON, Respondent, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. James R. Muirhead, U.S. Magistrate Judge]

Before Boudin, Chief Judge, Torruella, Circuit Judge, and Saris,[1] District Judge.

David M. Rothstein, Deputy Chief Appellate Defender, Appellate Defender Program, with whom Behzad Mirhashem, New Hampshire Public Defender, was on brief for petitioner.

Andrew R. Schulman and Getman, Stacey, Schulthess & Steere, P.A. on brief for New Hampshire Association of Criminal Defense Lawyers, Amicus Curiae.

Nicholas P. Cort, Assistant Attorney General, Criminal Justice Bureau, with whom Peter W. Heed, Attorney General, was on brief for respondent.

February 18, 2005

BOUDIN, Chief Judge.

In 1997, following a jury trial in New Hampshire Superior Court, Delvin White was convicted of three

[1] Of the District of Massachusetts, sitting by designation.

counts of sexual assault against two young girls and sentenced to a term of 30 to 90 years' imprisonment. At trial he was forbidden to offer evidence that both girls had previously made such accusations against other persons, even though the state supreme court ultimately found that such prior accusations showed a reasonable probability of falsity. In this habeas appeal, White pursues his claim that this restriction violated his confrontation clause rights.

Some core facts are undisputed. On March 2, 1996, White visited his friend Wayne and Wayne's girlfriend Marguerite at Wayne's apartment. Also present were Wayne's two daughters, ages eight and twelve, and Marguerite's two sons, 14-year-old Danny and her one-year-old infant. After dinner the two men played cards for a while but White spent most of the evening playing and watching television with the children in the playroom, except for trips out with Wayne to buy beer and provisions. There was evidence that each of the men drank in excess of a six-pack during the visit.

At around 9:00 p.m., Marguerite put the older girl to bed; the younger continued to watch television with Danny and White in the playroom. At 9:30, the younger daughter went to Marguerite and Wayne in the living room and told them that White had put his hand in her nightshirt and placed his finger on her "private." Wayne immediately attacked White, who responded by shouting a denial. During the confrontation, the older girl came out of her bedroom crying hysterically; Marguerite took all of the children to an upstairs neighbor's apartment and left them there while she went and called the police.

The police arrived shortly thereafter and one officer spoke briefly with the younger girl about her alleged assault (the older one appeared too distraught to interview). At the suggestion of the police, a doctor at the local hospital examined both girls, who complained to him of sexual assault; but the examination provided no confirmation, nor did a police forensic examination of 14 items of clothing worn by White and the two girls on that evening. There was evidence that these negative findings did not necessarily disprove the assault claims.

Police officers interviewed the two girls separately the next day. The older girl claimed that in the living room White had rubbed her breast and later touched her vagina before going to the store and, in the playroom after his return, had twice attempted to touch her and at one point had inserted his finger in her vagina. The younger girl made similar claims as to the period after which her sister had gone to bed. Danny, who had been present in the playroom, later said that he had not seen any of these alleged events. Although the apartment was small and one room opened into another, neither Wayne or Marguerite claimed to have witnessed the touchings.

White was tried three times, the first two cases ending in mistrials. In the third trial, as in the first two, the only direct evidence of the assaults came from the two girls. The forensic evidence was negative. Danny's version of events was helpful to White, and Marguerite and Wayne, who also testified, had not seen the assaults. The doctor and various police officers who testified had no direct knowledge but only the girls' own version.

White did not testify; quite possibly he feared cross-examination on his own criminal record, which included at

least two instances of sexual misconduct in the 1970s. He relied instead on Danny's testimony and on cross-examination of the two girls, designed to elicit inconsistencies within their stories and between them. He also suggested that the girls were alarmed by the extent of their father's drinking with White (Wayne had previously gone to prison for drinking-related offenses) and had sought their father's attention by making up the story of the assaults.

The prosecution agreed that its case was based on the theory that "these kids are telling the truth" and that the defense's case was based on the proposition that "[t]he kids are lying." Towards the very end of closing, the prosecutor asked rhetorically whether it would be "human nature to tell a horrific, huge lie against a stranger"; called the girls' truthfulness "the heart and soul of this case"; and suggested that they had "no motivation" and "no reason" to lie.

The third trial started with seven counts against White. Two were dismissed by the trial judge as inconsistent with the indictment and the jury deadlocked on two others – both for aggravated felonious assault based on the charges of digital penetration. The jury convicted, however, on two charges of ordinary felonious assault based on touchings of both of the girls' breasts and one charge of aggravated felonious assault for touching the outside of the older sister's vagina. The state's supreme court affirmed, considering and rejecting the constitutional claim now pursued in federal court.

The claim revolves around cross-examination and backup evidence that White sought to employ at trial. Specifically, White sought to cross-examine both girls

about prior accusations of sexual assault that they had made against three individuals: a neighbor whom both girls had accused of sexually assaulting them in 1993, and who had been acquitted by a jury of the charges in 1994; a cousin whom the older girl had accused of sexually assaulting her, but against whom charges were never brought; and another individual named "Mac" whom the older daughter had accused of sexually assaulting her but who was never identified by the police.

White claimed that all of these prior allegations were false and pointed to evidence available to support that claim if the girls denied making prior false accusations. With regard to the two girls' charges against their neighbor, White proffered the neighbor's verdict of acquittal; testimony from two witnesses at the 1994 trial claiming that the older girl had admitted to her mother and her mother's then-boyfriend that the original accusations were a lie; and various law enforcement reports of the incident from the younger girl that described the alleged assault inconsistently over time.

White also proffered testimony from the 1994 trial suggesting that the older girl had admitted the accusations against her cousin were a lie, and supplemented this proffer with reports from a police investigation into the incident that was eventually terminated due to a finding of reasonable doubt and inconsistencies between the girl's claims and background facts collected by the police officer assigned to the case. The only evidence as to falsity of the accusations against "Mac" was law enforcement's failure to identify anyone fitting his description; how thorough an investigation occurred is unclear.

In his motion in limine, White pointed to the similarity between the younger girl's accusations against her former neighbor and those against White (both claims involved an older man who had, in her words, "put his finger inside her private" and "reached over with one hand and rubbed her private" while sitting next to her on a couch) and a somewhat weaker congruence between the older girl's accusations against "Mac" and hers against White (both touching the outside skin of her vagina). White sought both to cross-examine the girls about their prior accusations and supposed recantations and, if the girls stood by their prior accusations, to offer the extrinsic evidence described above.

White argued in a pretrial hearing that the evidence bore upon credibility and showed prior sexual knowledge.[2] The trial judge ultimately prohibited all inquiry into the prior allegations. He said that so far as the evidence bore directly on credibility, New Hampshire law required such prior accusations to be "demonstrably false," which he said was not the case here; that the past and present allegations were similar only in generic terms; and that sexual knowledge could be shown by other means (e.g., through the children's doctor) without the same prejudice and invasion of privacy.

In addition to requiring that the prior accusations be demonstrably false, the trial judge also relied upon a New Hampshire evidence rule, N.H. R. Evid. 608, which is the counterpart to Fed. R. Evid. 608. In both cases, the rule in

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[2] The hearing and a detailed ruling took place incident to the second trial. At the third trial, the same ruling was made summarily by reference to the earlier ruling.

pertinent part permits an attack on a witness' credibility by opinion or reputation evidence, with restrictions and "in the discretion of the court," by cross-examination of the witness directed to specific instances of conduct bearing on truthfulness – including instances of prior untruths. *See* 4 Weinstein's Federal Evidence § 608.22 (McLaughlin ed., 2d ed. rev.2004).

On White's state court appeal, White argued that the ban on the evidence violated his confrontation rights under both the federal and state constitutions. The state supreme court held that White had proven the falsity of the girls' earlier accusations to a "reasonable probability," but it concluded that New Hampshire law required a higher standard for prior accusations – demonstrable falsity – which the court equated with clear and convincing evidence.[3] *State v. White*, 765 A.2d 156, 159, 161 (N.H. 2000). This view reflects New Hampshire case law rather than any specific language in Rule 608.

As to the constitutional claims, the court held that this limitation did not offend provisions of the state constitution granting the right to produce "all proofs that may be favorable" and the right to cross-examination. Saying merely that the federal constitution provided no greater protection, the state court also rejected White's own brief reliance upon the federal constitution. White's

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[3] The state supreme court did not distinguish among the three prior accusations in holding that White had proven their falsehood to a "reasonable probability." The evidence of falsehood for first two accusations is stronger than that against "Mac," but the state court may well have thought the evidence of each charge's falsity to reinforce that of the others.

petition for certiorari to the U.S. Supreme Court was denied. *White v. New Hampshire*, 533 U.S. 932 (2001).

White then brought the present habeas action in the federal district court in New Hampshire, where it was submitted by consent to a magistrate judge. The magistrate judge first held that the New Hampshire clear and convincing standard was unconstitutional under the Sixth Amendment because it imposed "an unduly high barrier" to probative defense evidence, *White v. Coplan*, 270 F. Supp. 2d 178, 188 (D.N.H. 2003); but on the state's motion to reconsider, the magistrate judge denied the habeas petition, saying he had been mistaken in taking a *de novo* view of the matter. *White v. Coplan* ("*White II*"), 296 F. Supp. 2d 46, 48-50 (D.N.H. 2003).

This revised decision invoked the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that a state court decision on a federal constitutional claim must be respected in a habeas proceeding unless it is contrary to, or an unreasonable application of, Supreme Court precedent. 28 U.S.C. § 2254(d) (2000). The magistrate judge held that the state supreme court had adjudicated White's federal constitutional claim and that the state court decision could not be overridden under the AEDPA standard. *White II*, 296 F. Supp. 2d at 50. He nevertheless granted a certificate of appealability on both issues. 28 U.S.C. § 2253(c) (2000); Fed. R.App. P. 22(b).

We agree with the magistrate judge that the AEDPA standard governs, but on the merits conclude that White has a constitutional claim. To trigger the AEDPA standard, the state court need not discuss the federal claim in any detail; we infer that the federal claim was considered if the state court rejects a counterpart state claim and then cites

to a case holding that the federal constitution provides no greater protection. *McCambridge v. Hall*, 303 F.3d 24, 35 (1st Cir. 2002) (en banc). However, in *McCambridge*, as this court emphasized, the state court was correct in its general assessment of the relationship between state and federal protections. *Id.*

Here, White argues that, in equating state and federal law, the New Hampshire court relied upon a number of state cases that dealt with the exclusion of prior accusations; but, White points out, these cases involved situations in which the evidence was ultimately subjected to a less stringent standard than demonstrable falsehood, or where cross-examination was permitted but extrinsic evidence excluded. On this basis, he says that the state court's equation of federal and state protections was itself mistaken so the AEDPA standard should not be applied to shelter its merits ruling.

AEDPA's policy is to provide deferential review where a state court has adjudicated the federal claim on the merits, and the state court did so in this case. A state court's reliance on arguably inapt prior precedents with related fact patterns may well bear on whether its application of federal law was "unreasonable"; but it is hard to see why the adjudication is less one "on the merits" because its reading of precedent may be faulted. Other circuits have taken a similar view, holding that a mere recognition and rejection of the federal claim without any further discussion still invokes AEDPA deference. *See Rompilla v. Horn*, 355 F.3d 233, 248 (3d Cir.) (collecting cases), *cert. granted sub nom., Rompilla v. Beard*, 125 S.Ct. 27 (2004); *see also Weeks v. Angelone*, 528 U.S. 225, 231, 237 (2000).

Nevertheless, given the state court's concession that the falsity of the girls' prior accusations was reasonably probable and the similarity of those accusations to the present ones, we rule that on these facts the state court's decision was an "unreasonable application" of "clearly established Federal law, as determined by the [U.S.] Supreme Court." We start with the question of what is "clearly established" Supreme Court law and then turn to the state court's rule requiring demonstrable falsity as applied to the circumstances of White's case.

The Supreme Court has declared cross-examination an essential constitutional right for a fair trial, subject to "reasonable limits" reflecting concerns such as prejudice, confusion or delay incident to "marginally relevant" evidence. *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986); *see also Pointer v. Texas*, 380 U.S. 400, 405 (1965). In a criminal case, restrictions on the defendant's rights "to confront adverse witnesses and to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)).

Such language, clear although general, calls for a balancing of interests depending on the circumstances of the case. Factors that the Supreme Court has deemed relevant are the importance of the evidence to an effective defense, *Davis v. Alaska*, 415 U.S. 308, 319 (1974); the scope of the ban involved, *Van Arsdall*, 475 U.S. at 679; and the strength *vel non* of state interests weighing against admission of the evidence. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Even if a state rule of exclusion is generally defensible, as is New Hampshire's version of Rule 608, it may on particular facts be applied

to produce an unconstitutional infringement. *See Lucas*, 500 U.S. at 152-53.

In this case, White's evidence was not merely "general" credibility evidence. That label applies to the traditional proofs – offered through character or reputation witnesses and sometimes through proof of specific instances of misbehavior, especially prior convictions – to support an inference that the witness has a tendency to lie. Once a staple of trials, modern evidence rules like Fed. R. Evid. 608 and 609 have significantly restricted such evidence without totally precluding it in all cases. *See generally* 4 *Weinstein's Federal Evidence, supra*, §§ 608.02[3], 609.02.

The evidence in this case was considerably more powerful. The past accusations were about sexual assaults, not lies on other subjects; and while sexual assaults may have some generic similarity, here the past accusations by the girls bore a close resemblance to the girls' present testimony – in one case markedly so. In this regard the evidence of prior allegations is unusual.

If the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive (although without pinpointing its precise character). The strength of impeachment evidence falls along a continuum. That a defendant told lies to his teacher in grade school is at one end; that the witness was bribed for his court testimony is at another. Many jurors would regard a set of similar past charges by the girls, if shown to be false, as very potent proof in White's favor.

This "if," of course, is the heart of the matter. If the witness were prepared to admit on the stand that a prior accusation of similar nature was false, it is hard to

imagine good reason for excluding the evidence. Prior admitted lies of the same kind in similar circumstances could powerfully discredit the witness. No time-consuming excursion beyond the witness would be required. Further, the accusation being conceded to be untrue, inquiry would not require the witness to admit to prior sexual activity or assault.

The difficulties arise when it is assumed that the witness will make no such admission of past lies. Then, other problems aside, the risk is presented of a substantial excursion by both sides into proof that the witness is or is not telling the truth as to a prior episode or even multiple episodes that are not the main subject of the trial. Confusion and diversion of effort from the main task are also matters of degree, but there was certainly some potential for both in the present case.

Yet cross-examination and extrinsic proof are two different issues. The ability to ask a witness about discrediting prior events – always assuming a good faith basis for the question – is worth a great deal. Imagine if White had been allowed to question the girls about their prior accusations, establish their similarity, and inquire into supposed recantations. The jury, hearing the questions and listening to the replies, might have gained a great deal even if neither side sought or was permitted to go further. *Cf. Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

White was accused of serious crimes – witness his sentence – and virtually everything turned on whether the two girls were to be believed. White had almost no way to defend himself except by impeachment. Danny's testimony was helpful to White but still negative: Danny could only say what he had not seen. Possible inconsistencies in the

girls' testimony could be explained by stress and confusion. By contrast, cross-examination to show prior similar accusations by the girls, allegedly recanted in two of the three instances, could easily have changed the outcome.

There is no Supreme Court case directly on all fours, but AEDPA requires no such thing. It is enough if the Supreme Court's general principles can be discerned and if, respectfully but with confidence, we think that failure to allow the evidence on the facts before us would be an unreasonable application of those principles. We do so conclude in this case and both our approach and our conclusion are strikingly similar to the view taken by the Seventh Circuit in *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001).

There, the defendant, a counselor at an institute for drug- and alcohol-abusing minors, was convicted of statutory rape of a 15-year old named Heather who said that the defendant had traded drugs for sex. The defense counsel sought to cross-examine Heather as to whether she had accused another man of rape 11 months before but later confessed to her mother that the charge had been partially false. The state court excluded this line of questioning as merely cumulative evidence going to credibility. *Redmond*, 240 F.3d at 590-91.

On habeas, Judge Posner accepted the AEDPA standard but held the exclusion an unreasonable application of the Supreme Court's confrontation clause doctrine. Judge Posner said that the evidence was highly probative and certainly non-cumulative because, unlike other available evidence bearing generally on credibility, it involved a similar prior accusation and its falsity implied a possible motive for a false charge against the defendant. *See*

Redmond, 240 F.3d at 591-92; *accord United States v. Stamper*, 766 F. Supp. 1396, 1400 (W.D.N.C. 1991).

Evidence suggesting a motive to lie has long been regarded as powerful evidence undermining credibility, and its importance has been stressed in Supreme Court confrontation cases. *See Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (per curiam); *Van Arsdall*, 475 U.S. at 680; *Davis*, 415 U.S. at 316-18, 320. In our case, as in Redmond, the nature of the motive may be unknown; but if the prior accusations are similar enough to the present ones and shown to be false, a motive can be inferred and from it a plausible doubt or disbelief as to the witness' present testimony.

We are dealing here with something far more potent than "general credibility" evidence which, under confrontation clause standards, may have a lower status. *See Davis*, 415 U.S. at 316; *Id.* at 321 (Stewart, J., concurring). Relying on the "general credibility" label, some circuit courts have declined to find confrontation clause violations where the judge excluded past accusations by the victim. Yet in one such case, *Boggs v. Collins*, 226 F.3d 728, 735 (6th Cir.2000), *cert. denied*, 532 U.S. 913 (2001), a hearing had found that the charge of prior falsity – indeed, of any prior accusations whatsoever – was itself false; in a second, the defendant's proffered evidence of falsehood was extremely weak. *Quinn v. Haynes*, 234 F.3d 837, 847, 851 (4th Cir. 2000), *cert. denied*, 532 U.S. 1024 (2001).[4] *Redmond* is closer to our own facts.

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[4] In a third case it was quite doubtful whether the prior statement was false, and the prior accusation was somewhat dissimilar. *United States v. Bartlett*, 856 F.2d 1071, 1087-88 & n.25 (8th Cir. 1988). Also,

(Continued on following page)

We conclude that, on the present facts, White was entitled to explore the prior accusations on cross-examination. White has narrowed his claim on appeal to cross-examination, and we are not endorsing any open-ended constitutional right to offer extrinsic evidence. Such an excursion requires more witnesses and documents, and so greater risks of confusion and delay; to say that impeachment here would cast light on a motive to lie is not to suggest that prior false accusations are the kind of evidence for which extrinsic evidence has traditionally been admitted. *Compare United States v. Abel*, 469 U.S. 45 (1984).

Nor do we say that New Hampshire's requirement of demonstrable falsity is always and everywhere infirm. Indeed, speaking of this same restriction, we said in *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st Cir. 2003) (en banc), that a general constitutional challenge to the "demonstrably false" requirement would be "an uphill struggle"; and we noted that "the confrontation clause objection is pretty well limited to extreme cases where the state restriction is patently unreasonable." We continue to adhere to this view, holding that it is the *application* of New Hampshire's general rule to the peculiar facts of this case that violates the Constitution.

In *Ellsworth*, the defendant had in fact been permitted to cross-examine his accuser regarding prior false accusations and had been precluded only from introducing extrinsic evidence, *State v. Ellsworth*, 709 A.2d 768, 772-74

Bartlett's treatment more resembles a balancing inquiry than a *per se* rule excluding general credibility evidence from confrontation clause protection. *See also Hughes v. Raines*, 641 F.2d 790, 792-93 (9th Cir. 1981).

(N.H. 1998), and our main concern was whether evidence pointing to *further* false accusations had been wrongly withheld. *Ellsworth* did not decide what would happen if the search disclosed such accusations that were false to a reasonable probability. The decision did note that "strong evidence of a prior false accusation," at least if the "setting and type of alleged lie are similar [to the present testimony]," would be "very powerful." 333 F.3d at 5.

We are concerned here with an attempt to pursue by cross-examination prior past accusations of a quite similar character to the present one; with a ruling – which is quite unusual – that the prior accusations (or at least two of them) were false to a reasonable probability; with a resulting plausible inference of a motive to deceive that could infect the present testimony of the two vital prosecution witnesses; and with a defendant who had virtually no other way to defend himself. This is the unusual situation and, to us, an "extreme case[]."

The judgment is *vacated* and the matter is *remanded* to the district court with directions to enter an order providing that White must be released unless – within a reasonable time to be fixed by the district court – he is afforded a new trial.

It is so ordered.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 04-1044

DELVIN WHITE, Petitioner, Appellant,

v.

JANE COPLAN, WARDEN,
NEW HAMPSHIRE STATE PRISON,
Respondent, Appellee.

March 2005

ERRATA

The opinion of this court issued February 18, 2005, is amended as follows:

On page 16, line 15, delete the phrase ", as in *Redmond*,".

APPENDIX C

United States District Court,
D. New Hampshire,
Delvin **WHITE**
v.
Jane **COPLAN**, Warden, New Hampshire State Prison
No. 02-280-JM.
Dec. 10, 2003.

David M. Rothstein, Franklin Pierce Law Center, Appellant Defender Program, Concord, NH, for Petitioner.

Nicholas P. Cort, New Hampshire Attorney General's Office, Concord, NH, for Respondent.

ORDER

MUIRHEAD, United States Magistrate Judge.

Before the Court for consideration is Respondent's motion under Fed.R.Civ.P. 59(e) to alter the judgment in the above-captioned matter (document no. 14). Petitioner has filed an objection (document no. 18).

On July 9, 2002, the Petitioner filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 attacking his state court convictions on sexual assault charges. After this Court's preliminary review of the petition, the Respondent filed an answer. Thereafter, the parties consented to the assignment of this case to the United States Magistrate Judge, and Respondent subsequently filed a motion for summary judgment.

The central issue in this case is whether the New Hampshire state courts violated Petitioner's rights under

the Sixth Amendment to the United States Constitution to cross-examine the complaining witnesses against him where the trial court found that Petitioner could not cross-examine the complaining witnesses regarding an alleged pattern of prior false allegations of similar offenses against others even though Petitioner had demonstrated the falsity of those prior allegations to a reasonable probability. After reviewing the matter, this Court issued an order on July 11, 2003, denying Respondent's motion for summary judgment, and granting the Petitioner's application for a writ of habeas corpus (document no. 12).

The standard of review that the Court applied to the consideration of the Petitioner's federal constitutional claim was of critical importance to the decision. Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), the federal courts may not grant a state prisoner a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). There is no dispute that the Supreme Court of the United States has not decided a case where it held that a defendant's Sixth Amendment right to cross-examine witnesses requires the introduction of the type of

evidence claimed to have been wrongfully excluded in the Petitioner's case. Therefore, if Petitioner's federal constitutional claim was adjudicated on the merits in the state court proceedings, application of the deferential standard of Section 2254(d)(1) would be fatal to the Petitioner's claim. That is so because federal law has not been clearly established in Petitioner's favor within the meaning of the AEDPA. In this Court's July 11, 2003 Order, 270 F.Supp.2d 178, 2003 WL 21635006, however, the Court stated that:

> In light of the NHSC's express decision not to undertake a separate federal analysis of White's federal claim, and the NHSC's apparent reliance on state authorities that do not support its perfunctory dismissal of analysis of federal law, this Court finds that White's federal constitutional claim was not adjudicated on the merits in the state court.

July 11, 2003 Order at 10, 270 F.Supp.2d 178, 2003 WL 21635006 at * 4. Since the Court found that there was no adjudication of Petitioner's federal constitutional claim in the state court proceedings to which the Court should defer, the Court further found Petitioner's claim required *de novo* review under First Circuit precedent. *Id.*[1] Exercising its independent judgment on *de novo* review, the Court found that the Supreme Court's Confrontation Clause

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[1] *See Fryar v. Bissonnette,* 318 F.3d 339, 340 (1st Cir.2003) (finding that *de novo* review was required where the federal claim was properly presented, but had not been addressed by the state's highest court); *DiBenedetto v. Hall,* 272 F.3d 1, 6 (1st Cir.2001) (finding that the AEDPA does not apply where the state court has not decided the federal constitutional issue); *Fortini v. Murphy,* 257 F.3d 39, 47 (1st Cir.2001) (AEDPA does not apply when the federal claim was not addressed by the state courts).

jurisprudence reasonably extends to cross-examination of adverse witnesses about a pattern of allegedly false accusations against others of the type of offense of which the defendant is accused in circumstances where the defendant has demonstrated the falsity of those prior accusations by a reasonable probability.

In her Rule 59(e) motion, Respondent urges the Court to reconsider whether it was appropriate to apply *de novo* review in this case. Finding that Respondent's motion raises a serious legal question, the Court re-examines that issue here before this case makes its way to an almost certain appeal.

The Supreme Court's decision in *Early v. Packer,* 537 U.S. 3, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002), bears mention. In *Early,* the Court reversed a decision of the Ninth Circuit in a habeas case in which the Ninth Circuit observed that the state court had not cited the controlling Supreme Court precedents on the relevant issue, nor indeed any federal law. *Id.* at 8, 123 S.Ct. 362. The Supreme Court found that a state court need not cite, or even be aware of, the Supreme Court's cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.* In *Ellsworth v. Warden, N.H. State Prison,* 333 F.3d 1 (1st Cir.2003), the First Circuit rejected an argument that *Early* invalidated the First Circuit's opinion in *Fortini* that the AEDPA does not apply when the federal claim was not addressed by the state courts. The First Circuit found that *Early* stands only for the proposition that deference under the AEDPA does not depend on the state court citing federal case law. *Ellsworth,* 333 F.3d at 4 n. 1. Thus, *Fortini* is ostensibly still good law.

Notwithstanding the First Circuit's finding in *Ellsworth,* however, the First Circuit has embraced a rule that greatly restricts the application of *Fortini.* The court has found that the adjudication of a habeas petitioner's federal constitutional claim should be deemed "subsumed" within the state court's adjudication of the petitioner's state law claim if the state court has held that the state adheres to a standard that is more favorable to defendants than the applicable federal standard. *See Norton v. Spencer,* No. 03-1571, 351 F.3d 1, 2003 WL 22459121 at *3 (1st Cir. Oct.30, 2003) (finding that it was inappropriate for the district court to apply *de novo* review to a habeas petitioner's federal claim because adjudication of the claim was subsumed within the state appellate court's adjudication of the issue under state law); *McCambridge v. Hall,* 303 F.3d 24, 35 (1st Cir.2002) ("If there is a federal or state case that explicitly says that the state adheres to a standard that is more favorable to defendants than the federal standard . . . , we will presume the federal law adjudication to be subsumed within the state law adjudication"). Under this reading of the law, a claim that arises under both state and federal law need not be considered as two distinct claims in order for the AEDPA to apply. As a consequence, a state defendant who is aggrieved by a decision in the state courts is not entitled to a full adjudication of his federal constitutional claim in either the state courts, nor in the federal courts on habeas review, if the state deems its standard more favorable than the federal standard.[2]

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[2] There is an apparent exception to the First Circuit's rule if the state court is *incorrect* in its determination that the state standard is more favorable to defendants than the federal standard, but it not

(Continued on following page)

Respondent argues in her Rule 59(e) motion that the adjudication of Petitioner's federal constitutional claim was subsumed within the New Hampshire Supreme Court's analysis of the state law claim when the court found, without discussion, that federal law did not provide the defendant any greater protection. Respondent argues that the court's opinion was supported by its citation of *State v. Ellsworth,* 142 N.H. 710, 719-20, 709 A.2d 768 (1998), which in turn cited a federal case, *United States v. Stamper,* 766 F.Supp. 1396, 1400 (W.D.N.C.1991). Respondent further argues that the district court in *Stamper* employed the same standard used by the New Hampshire Supreme Court in Petitioner's case.

The Court finds Respondent's argument unpersuasive for two reasons. First, the issue raised in *State v. Ellsworth* was not the same issue that Petitioner presented in the instant case. *State v. Ellsworth* addressed the admissibility of *extrinsic evidence* of prior false allegations of sexual assault. Petitioner's case concerns the defendant's right to cross-examine an accusing witness with prior false allegations, rather than to introduce extrinsic evidence of the prior false allegations at trial. Second, the Court disagrees with the Respondent's interpretation of *Stamper.* In *Stamper,* the district court presented the issue to be decided as:

> in a prosecution for statutory rape, where the Government's sole incriminating evidence is the complainant's testimony and where the complainant

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entirely clear how this exception is to be applied. *See McCambridge v. Hall,* 303 F.3d at 35 (suggesting that the AEDPA does not apply if the state court is incorrect in its characterization of the state standard as more favorable than the federal standard).

> has admitted in writing to falsely accusing her mother's boyfriend of sexual molestation on a prior occasion and has made accusations against two others under circumstances tending to show ulterior motives on her part, should the Court find to be admissible (a) cross examination of the complainant concerning such accusations, and (b) testimony by all three prior accusees that the accusations against them were false.

766 F.Supp. at 1399. Although the court in *Stamper* found that there was a substantial similarity between the complainant's prior accusations and the accusation at issue, and that there was substantial proof of the falsity of those prior allegations, the court did not find, as the New Hampshire Supreme Court did in Petitioner's case, that a defendant must demonstrate "clearly and convincingly" the falsity of the prior allegations before they may be found admissible evidence. Indeed, the district court noted that a letter written by the complainant regarding one of the prior accusations, and the complainant's *in camera* testimony pertaining to all three prior allegations created "reasonable doubt" as to the veracity of the prior allegations. *Id.* at 1402. Therefore, *Stamper* does not support the New Hampshire Supreme Court's ruling.

Setting aside the reasoning behind the New Hampshire Supreme Court's decision, however, it is clear that the published cases decided by the federal courts of appeal on constitutionally required cross-examination are unfavorable to the Petitioner. Relying on the reasoning in Justice Stewart's concurring opinion, those courts have interpreted *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), as setting forth a dividing line between constitutionally required cross-examination to

expose the witnesses' bias, prejudice or motive and cross-examination intended as a general attack on the witness' credibility. *See e.g., Redmond v. Kingston,* 240 F.3d 590, 593 (7th Cir.2001); *Quinn v. Haynes,* 234 F.3d 837, 845 (4th Cir.2000), *Boggs v. Collins,* 226 F.3d 728, 739-40 (6th Cir.2000), *United States v. Bartlett,* 856 F.2d 1071, 1087-89 (8th Cir.1988); *Hughes v. Raines,* 641 F.2d 790, 793 (9th Cir.1981). Those cases are not factually on point with the instant case, however, because none of them involved an alleged pattern of prior allegations of similar offenses against others that have been shown to be false to a reasonable probability. Although the Petitioner has not articulated a specific theory of motive in this case, a pattern of false accusations may be considered indicative of some motive to lie, making this case similar to the "*Davis*-type" defense theory of a motive or scheme to fabricate the sexual assault allegations. *See Stamper,* 766 F.Supp. at 1402 (finding that "defendant was entitled to offer the evidence necessary to prove his theory of the case by showing that complainant's charges against him did not evince a single isolated instance of manipulative behavior, but rather were part of an ongoing scheme revealed by the like motive and *modus operandi* of schemes past"). Nevertheless, this Court's review of this matter *de novo* does not demonstrate that the Supreme Court of the United States, or the federal courts of appeal, would so find if directly presented with this question.

Bound by circuit precedent on the application of the AEDPA, the Court finds that the New Hampshire Supreme Court's adjudication of the Petitioner's federal constitutional claim, by means of adjudication of the analogous claim under state law, was not contrary to, nor an unreasonable application of, federal law as decided by

the Supreme Court of the United States. Therefore, the Court may not grant Petitioner a writ of habeas corpus.

The Respondent's motion to alter the judgment (document no. 14) is granted. This Court's July 11, 2003 Order (document no. 12) is hereby withdrawn. Respondent's motion for summary judgment (document no. 6) is granted. The Clerk of Court is directed to enter judgment for the Respondent and close the case.

SO ORDERED.

APPENDIX D

United States District Court
D. New Hampshire
Delvin **WHITE**
v.
Jane **COPLAN,**
Warden New Hampshire State Prison For Men
No. CIV. 02-280-JM.
July 11, 2003.

David M. Rothstein, Franklin Pierce Law Center Appellant Defender Program, Concord, NH, for Petitioner.

Nicholas P Cort, Attorney General's Office, Concord, NH, for Respondent.

ORDER

MUIRHEAD, United States Magistrate Judge.

Petitioner Delvin White is an inmate at the New Hampshire State Prison for Men ("NHSP"). In 1997, White was found guilty on charges of committing one count of aggravated felonious sexual assault and two counts of felonious sexual assault following a jury trial in the Superior Court, Hillsborough County. White's convictions were affirmed on appeal to the Supreme Court of New Hampshire ("NHSC") in December 2000. In the instant action, White seeks a federal writ of habeas corpus claiming that his right to confront witnesses, secured by the Sixth Amendment to the United States Constitution, was violated in the New Hampshire state courts because the trial court prohibited all cross examination of the complaining witnesses concerning their prior allegations of sexual assault against other persons even though White was able to establish the falsity of those prior allegations

to a "reasonable probability." White contends that the trial court's complete denial of any cross-examination concerning the complaining witnesses' prior allegations of sexual assault was contrary to, or involved an unreasonable application of, federal law as determined by the Supreme Court of the United States. This is White's first petition for a writ of habeas corpus in the federal district court.

The Respondent in this action is Jane Coplan, NHSP Warden. Respondent filed a motion for summary judgment on White's habeas petition under Rule 11 of the Rules Governing § 2254 Cases and Rule 56 of the Federal Rules of Civil Procedure. Respondent contends that there is no genuine issue of material fact, and that she is entitled to judgment as a matter of law. White filed an objection. The Court requested that the parties submit supplemental memoranda after the United States Court of Appeals for the First Circuit ("First Circuit") issued its *en banc* opinion in *Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1 (1st Cir.2003), which addresses issues similar to those raised in the instant case.

After carefully reviewing the parties' submissions, and the relevant authorities, the Court finds that White has established that his Sixth Amendment Confrontation Clause rights were violated by the decisions of the New Hampshire state courts. The Court finds that the New Hampshire state courts imposed an unreasonable restriction on White's right to cross-examine the complaining witnesses under the facts of this particular case. It is the opinion of this Court that White's convictions were not the result of a fair trial. Accordingly, for the reasons set forth below, Respondent's motion for summary judgment is denied and the petition for a writ of habeas corpus is granted.

Background

I. *Factual Background*[1]

On March 2, 1996, White spent the afternoon visiting a friend and his girlfriend at their apartment in Manchester, New Hampshire. The friend had two daughters, ages twelve and eight, and the friend's girlfriend had two sons, all of whom were together in the apartment that day. After spending the afternoon playing cribbage, listening to the radio, and drinking beer with his friend, White was invited to have dinner at the friend's house. It was later agreed that White would spend the night.

At White's criminal trial, the younger daughter testified that while she sat with White on a day bed watching television, White rubbed her breasts, put his hand down her pants, and "stuck his finger in." When the daughter told her father what happened, the father attacked White. During this confrontation, the older daughter came out of a bedroom crying hysterically. She later told a doctor that earlier that same day White had touched her breasts, her vaginal area, and inserted his finger into her "private." As the confrontation between the father and the defendant continued, the father's girlfriend took all of the children to a neighbor's apartment and called the police. After an investigation, the police told the girlfriend to take the alleged victims to the hospital for a physical examination, which she did.

White was charged in the Superior Court with sexual assault. The complaining witnesses, then aged twelve and

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[1] The facts are taken primarily from the NHSC's opinion in *State v. White*, 145 N.H. 544, 765 A.2d 156 (2000).

eight, testified that White had sexually assaulted them. White moved *in limine* to introduce evidence, through cross-examination, intended to show that both complaining witnesses had previously made false accusations of sexual assault against other persons. White sought to introduce evidence that the two complaining witnesses had previously accused a neighbor of sexual assault. White further sought to introduce evidence that the twelve-year-old had falsely accused two other persons of sexual assault. After a hearing on the motion *in limine*, the trial court denied White's motion, finding that White had failed to show that the prior allegations were "demonstrably false." The trial court prohibited all cross examination concerning the prior allegations of sexual assault. White was convicted of aggravated felonious sexual assault against the older child and one count of felonious sexual assault against each child.

II. *Procedural History*

White appealed his convictions to the NHSC. In his appeal, White argued that trial court erred in excluding evidence of the complaining witnesses' prior allegations of sexual assault against other persons. White challenged the trial court's ruling under state and federal law. The NHSC held that the trial court acted within its discretion in excluding White's proffered evidence, and that the court had applied the correct standard under New Hampshire evidentiary law when it required White to show that the prior accusations of sexual assault were "demonstrably false," before they could be inquired into on cross-examination. *Id.* at 547-51, 765 A.2d at 159-61. The court ruled that White had not shown that the prior allegations were "demonstrable false" because he had not demonstrated

"clearly and convincingly" to the trial court that the accusations were false. *State v. White*, 145 N.H. 544, 553-54, 765 A.2d 156, 163. The standard employed by the NHSC was first announced in White's case. The court's ruling was based on Rule 608(b) of the New Hampshire Rules of Evidence.[2] *See White*, 145 N.H. at 547, 765 A.2d at 158. The court stated that it did not undertake a separate federal analysis "[b]ecause federal law does not provide any additional protection in this area." *White*, 145 N.H. at 553-54, 765 A.2d 156, *citing State v. Ellsworth*, 142 N.H. 710, 720, 709 A.2d 768 (1998) and *Clinebell v. Commonwealth*, 235 Va. 319, 368 S.E.2d 263 (1988). White filed a petition in the Supreme Court of the United States for a writ of certiorari, but the petition was denied. *White v. New Hampshire*, 533 U.S. 932, 145 N.H. 544, 121 S.Ct. 2557, 150 L.Ed.2d 722 (2001).

On September 11, 2001, White was sentenced in the Superior Court to serve three consecutive sentences of 10 to 30 years in the NHSP. The Superior Court's Sentence Review Division affirmed that sentence on April 23, 2002. White will not be eligible for parole until he has served at least 30 years in prison.

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[2] The text of Rule 608(b) of the New Hampshire Rules of Evidence tracks the language used in the federal rules of evidence. The rule provides in relevant part that:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, ...

N.H. R. Evid. 608(b).

Standard of Review

Summary judgment may be granted in a habeas proceeding when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Monroe v. Coplan*, No. Civ. 02-069-B, 2002 WL 31689343 (D.N.H. Nov. 22, 2002); *Marro v. Cunningham*, No. 97-652-JD, 2000 WL 1466114 (D.N.H. Jan. 21, 2000). A genuine issue is one "that properly can be resolved only by a finder of fact because [it] . . . may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A material fact is one that affects the outcome of the suit. *See id.* at 248.

White's habeas petition was filed after the passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996). Under the AEDPA, the federal courts may not grant a state prisoner a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 2002). With respect to factual issues, the AEDPA mandates that a state court's findings

"shall be presumed to be correct" and the petitioner bears the burden of disproving factual findings by "clear and convincing evidence." 28 U.S.C. § 2254(e); *DiBenedetto v. Hall*, 272 F.3d 1, 6 (1st Cir.2001). This presumption of correctness in favor of the state court's factual findings "overrides the ordinary rule that, in summary judgment proceedings, all disputed facts must be construed in the light most favorable to the nonmoving party." *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir.2002).

A threshold issue that must be determined is whether White's federal constitutional claim was "adjudicated on the merits" in the state court proceedings within the meaning of 28 U.S.C. § 2254(d). The NHSC found that the trial court applied the proper evidentiary standard applicable to prior false allegations under Rule 608(b) of the New Hampshire Rules of Evidence. The NHSC expressly stated that *it did not* undertake a separate federal analysis of the Petitioner's Sixth Amendment claim finding, without any supporting analysis, that federal law does not provide any additional protection in this area. *Id.* at 554, 765 A.2d at 163. The NHSC appeared to cite its decision in *State v. Ellsworth*, 142 N.H. at 719-20, 709 A.2d at 774 and the Supreme Court of Virginia's decision in *Clinebell v. Commonwealth*, 368 S.E.2d at 266, as support for its conclusion.

There is support for the proposition that a federal habeas court may find that the state court adjudicated a petitioner's federal claim on the merits if the state court decides the issue by reference to state court decisions that deal with the federal issues. *See DiBenedetto v. Hall*, 272 F.3d at 6. Similar to the instant case, however, the NHSC concluded in *State v. Ellsworth*, also without undertaking a separate federal analysis, that federal law provides no

additional protection in this area. *See* 142 N.H. at 719-20, 709 A.2d at 774. In *Clinebell*, the other case seemingly cited by the NHSC as support in *White*, the Supreme Court of Virginia found that the Sixth Amendment's Confrontation Clause required allowing a defendant to cross-examine a complaining witness about a prior false accusation if the court makes a threshold determination that a reasonable probability of falsity exists. 368 S.E.2d at 266. While the NHSC found that White could meet the "reasonable probability of falsity" standard, *White*, 145 N.H. at 551, 765 A.2d at 161, the NHSC did not use the standard that *Clinebell* found constitutionally mandated choosing instead to rely on its New Hampshire evidentiary rule requiring the defendant to show "clearly and convincingly" to the trial court that a prior accusation was false before permitting the defendant any cross-examination about those prior accusations. *Id.* at 548, 765 A.2d at 159.

In light of the NHSC's express decision not to undertake a separate federal analysis of White's federal claim, and the NHSC's apparent reliance on state authorities that do not support its perfunctory dismissal of analysis of federal law, this Court finds that White's federal constitutional claim was not adjudicated on the merits in the state court. *Cf. Ylst v. Nunnemaker*, 501 U.S. 797, 802-03, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (recognizing that when a state court issues "an unexplained order (by which we mean an order whose text or accompanying decision does not disclose the reason for the judgment") . . . [a]ttributing a reason is both . . . difficult and artificial); *see also*, Brittany Glidden, *When the State is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. Rev. L. & Soc. Change 177, 208-10 (2001-2002) (arguing that Congress intended to preserve a defendant's right to one full

adjudication of a federal constitutional claim when it passed the AEDPA). Since this Court finds that there was no adjudication of White's federal claim in the state court proceedings to which this Court should defer, under First Circuit precedent this Court is required to give White's federal constitutional claim *de novo* review. *See Fryar v. Bissonnette*, 318 F.3d 339 (1st Cir.2003); *DiBenedetto*, 272 F.3d at 6; *Fortini v. Murphy*, 257 F.3d 39, 47 (1st Cir.2001).[3] The Supreme Court's decision in *Early v. Packer*, 537 U.S. 3, 123 S.Ct. 362, 365 (2002), does not require a contrary conclusion. *See Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, at 2 n. 1 (*Early* stands only for the proposition that deference does not depend on the state court citing federal case law).

As this Court has found that the state courts did not adjudicate White's federal constitutional claim on the merits, because it failed to explain how it reached its conclusion or cite any authority that supports it, the Court applies the pre-AEDPA standard of habeas review. *See Washington v. Schriver*, 255 F.3d 45, 55 (2d Cir.2001) (assuming arguendo that the petitioner's constitutional claim was not adjudicated on the merits and applying the pre-AEDPA standard or review). "Before 1996, this Court held that a federal court entertaining a state prisoner's application for habeas relief must exercise its independent judgment when deciding both questions of constitutional law and mixed constitutional questions (i.e., application of

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[3] Notwithstanding this Court's finding that White's federal constitutional claim was not adjudicated on the merits in the state courts, the Court presumes that the state court's factual determinations were correct and applies them in consideration of White's federal claim. *See DiBenedetto*, 272 F.3d at 7, n. 1.

constitutional law to fact)." *Williams v. Taylor*, 529 U.S. 362, 400, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Accordingly, this Court exercises its independent judgment in considering the merits of White's federal constitutional claim.

Discussion

I. *Constitutional Right to Confront Witnesses*

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI. The Sixth Amendment right to confront witnesses is a fundamental right secured for defendants in state and federal criminal proceedings. *Smith v. Illinois*, 390 U.S. 129, 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968); *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). A primary interest secured by the Confrontation Clause is the right of the accused to cross-examine adverse witnesses. *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Pointer*, 380 U.S. at 405, 85 S.Ct. 1065. The right of cross-examination is a "functional" right designed to promote reliability in the truth-finding functions of a criminal trial. *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *see also*, *Pointer*, 380 U.S. at 405, 85 S.Ct. 1065 ("certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case").

Despite the central importance of a defendant's right of cross-examination of adverse witnesses, the Supreme Court has found that "trial judges retain wide latitude

insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). The Court has stated generally that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (emphasis in original). Still, Supreme Court precedent makes clear that a criminal defendant retains the right to conduct reasonable cross-examination under the Sixth Amendment. *Olden v. Kentucky*, 488 U.S. 227, 231, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). The Court has found that a Confrontation Clause issue is presented when a defendant alleges that cross-examination restrictions imposed by law or by the trial court "effectively emasculate the right of cross-examination itself." *Smith v. Illinois*, 390 U.S. at 131, 88 S.Ct. 748; *Kentucky v. Stincer*, 482 U.S. at 737, 107 S.Ct. 2658; *Delaware v. Fensterer*, 474 U.S. at 18, 106 S.Ct. 292. The instant case requires the Court to determine whether the New Hampshire state courts imposed an unreasonable restriction on White's right to cross-examination.

II. *Distinction Between General Attacks on Credibility and Attacks Directed Toward Revealing Possible Biases, Prejudices or Ulterior Motives*

The Respondent contends that while cross-examination directed towards exposing a witness' possible bias or motive is constitutionally protected, cross-examination intended

merely as a general attack on the witness' credibility is not. Respondent argues that in the instant case White merely intended to cross-examine the complaining witnesses pertaining to their prior allegations of sexual assault to attack their credibility generally, and thus the Confrontation Clause was not implicated. According to the Respondent, "[n]o matter how clear it is that a complainant made prior false accusations, the Sixth Amendment does not require that evidence of this fact be admitted, unless the evidence is probative of a material issue such as bias or motive." Mem. in Support of Mot. for Summ. J. at 6.

In his objection, White contends that his accusers' pattern of similar false allegations about the very type of offense that they have accused him of committing supports an inference that the accusers had "some motive to lie." *See* Pet. Resp. to Mot. for Summ. J. at 4. White further contends that since the probative value of evidence that a complaining witness has falsely accused others of committing offenses similar to the offense that the defendant is accused of committing clearly exceeds the probative value of more generic instances of dishonesty. *Id.* at 7.

The distinction between cross-examination to attack a witness' credibility generally and cross-examination as a particular attack on a witness' credibility was discussed in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). There, the Supreme Court found that a general attack on credibility, as through introduction of evidence of a prior conviction, intends to provide the jury with "a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony." *Id.* at 316, 94 S.Ct. 1105. In contrast, the Court found that a defendant may make a particular attack on a witness' credibility through "cross-examination directed

toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to the issues or personalities in the case at hand." *Id.* The Court subsequently stated in a later case that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. at 680, 106 S.Ct. 1431, *quoting Davis*, 415 U.S. at 318, 94 S.Ct. 1105.

The parties have not identified any case, and this Court is not aware of any, where the Supreme Court has found that a defendant's constitutional right to cross-examine witnesses requires the introduction of evidence intended to impeach a witness' general credibility. This Court finds, exercising its independent judgment, that the Supreme Court's Confrontation Clause jurisprudence, emphasizing the fundamental role of cross-examination in assuring the reliability of fact finding, reasonably extends to cross-examination of adverse witnesses about a pattern of allegedly false accusations against others of the type of offense of which the defendant is accused. *See e.g.*, *Pointer*, 380 U.S. at 405, 85 S.Ct. 1065 ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal"); *Smith*, 390 U.S. at 131, 88 S.Ct. 748 ("we have repeatedly stated that '[a] denial of cross-examination without waiver . . .

would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'"); *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (recognizing that cross-examination is the "'greatest legal engine ever invented for the discovery of truth.'"); *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (finding that "[t]he right of cross-examination is more than a desirable rule of trial procedure," rather "[i]t is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determination process.'"); *Kentucky v. Stincer*, 482 U.S. at 736, 107 S.Ct. 2658 ("The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process.").

In *Davis v. Alaska*, the Supreme Court found that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." 415 U.S. at 316, 94 S.Ct. 1105. The Court continued, "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner *is not only* permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness." *Id.* (emphasis added). Contrary to the Respondent's contention, the *Davis* Court did not state a bright line rule that a criminal defendant has no protection under the Sixth Amendment for cross-examination intended to attack a witness' credibility generally. Rather, the Court held, under the facts of that case, that the defendant's Sixth Amendment rights had been violated because the trial court denied the defendant an opportunity to show the existence of a bias on the part of an adverse witness,

which could have affected the accuracy and truthfulness of his testimony. *See Davis*, 415 U.S. at 317-18, 94 S.Ct. 1105. It is the opinion of this Court that the Supreme Court has reserved judgment on the extent of constitutional protection of cross-examination intended to impeach a witness' general credibility.[4]

This Court finds that Justice Stewart's concurrence in *Davis*, emphasizing that "the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions," *see Davis*, 415 U.S. at 321, 94 S.Ct. 1105, does not foreclose White's federal constitutional claim for two reasons. First, Justice Stewart's concurrence was not the opinion of the Court. Second, it is plain that the type of evidence Justice Stewart discussed – cross-examination about past delinquency adjudications or criminal convictions to impeach the general credibility of a witness – is not necessarily of the same probative value as cross-examination of a complaining witness pertaining to a pattern of false accusations against others of similar offenses. Where, as here, the defendant has evidence that a complaining witness has

[4] The Court recognizes that there are decisions from other federal circuits courts that have found that there is a dividing line between constitutionally required cross-examination to expose the witnesses' bias, prejudice or motive and cross-examination intended as a general attack on the witness' credibility. *See e.g.*, *Redmond v. Kingston*, 240 F.3d 590, 593 (7th Cir.2001); *Quinn v. Haynes*, 234 F.3d 837, 845 (4th Cir.2000), *Boggs v. Collins*, 226 F.3d 728, 739-40 (6th Cir.2000), *United States v. Bartlett*, 856 F.2d 1071, 1087-89 (8th Cir.1988); *Hughes v. Raines*, 641 F.2d 790, 793 (9th Cir.1981). However, none of those cases involved an alleged pattern of prior false allegations of similar offenses against others.

engaged *in a pattern* of making similar allegations against others, and where the state court has found that the defendant has shown that those prior allegations *were false to a reasonable probability*, it strains reason to suggest that such evidence is not probative of whether the testimony of the complaining witness is credible.

Notwithstanding the open issue of law of constitutional protection of cross-examination intended to attack a witness' general credibility, here White argues that a pattern of prior false allegations by the complaining witnesses may be indicative of some motive to testify falsely. Viewed as such, White's federal constitutional claim may be reconciled with the Supreme Court's existing cases. And while White has not articulated a particular motive theory, that should not be a rigid bar to cross-examination. *See Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir.1980) (rejecting the argument that the defense is required to articulate a precise theory of bias before being permitted to cross-examine witnesses about earlier criminal proceedings); *see also*, *Alford v. United States*, 282 U.S. 687, 692, 51 S.Ct. 218, 75 L.Ed. 624 (1931) (finding that cross-examination "is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general apply"). The NHSC recognized the potential of White's evidence to expose the complaining witness' motive to testify falsely. Indeed, the NHSC found in its opinion that "the prior allegations of sexual assault are not probative of the victims' motives because . . . the defendant has failed to demonstrate clearly and convincingly that the prior allegations are false." *White*, 145 N.H. at 554, 765 A.2d at 163. Had White been allowed a reasonable opportunity to explore the prior allegations of sexual assault a specific motive might have become readily

apparent. The evidence of a pattern of prior allegations of similar offense surely could have affected the jury's perception of the reliability of the complaining witnesses. *See Davis*, 415 U.S. at 318, 94 S.Ct. 1105 ("defense counsel should have been permitted to expose to the jury the facts from which, the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness").

While it may have been appropriate for the trial court to prohibit White from introducing extrinsic evidence to impeach the complaining witnesses, White should have been permitted to expose to the jury, through cross-examination about the prior allegations of sexual assault, evidence which may have severely undermined the complaining witnesses' credibility. *See United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) ("The 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to 'take the answer of the witness' with respect to less favored forms of impeachment."); *see also, Montana v. Egelhoff*, 518 U.S. 37, 43-44, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (a state evidentiary rule violates the due process clause if it offends a fundamental principle of justice developed under the common law). It appears to this Court that this is an extreme case where the state court's restriction on the defendant's right to cross-examination was manifestly unreasonable and overbroad. *See United States v. Gomes*, 177 F.3d 76, 81-82 (1st Cir.1999) (finding that claims of evidentiary error under the Confrontation Clause are only tenable where the restriction is manifestly unreasonable or overbroad).

The First Circuit's *en banc* opinion in *Ellsworth*, although not directly controlling, supports the validity of

White's federal constitutional claim. In *Ellsworth*, a case where the defendant was charged with sexually assaulting a minor, the First Circuit found that the defendant raised a viable claim under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), where the prosecution failed to turn over a youth center intake note suggesting that the complaining witness had made false accusations of sexual abuse against his caretakers in the past. *Ellsworth*, 333 F.3d 1, at 1-2. The First Circuit found that the document, although not itself admissible, was exculpatory. *Id.* The court found that document could have led the defendant to persons who could testify as to the circumstances of the allegations and the basis for believing them to be false. *Id.* The court found that,

> If strong evidence of a prior false accusation exists, it would be very powerful. The setting and type of alleged lie are similar, so this evidence would be far more potent than a random unrelated episode of untruthfulness by [the complaining witness]. . . . Coupled with [proof of the complaining witness' instability], evidence that the [complaining witness] had falsely accused caretakers before could easily have created the reasonable doubt necessary to acquit Ellsworth in what was otherwise largely a credibility contest.

Id. at 5. The court declined to resolve whether the New Hampshire standard for admission of evidence of a complaining witness' prior false accusations, that the allegations be "clearly and convincing" false, is unconstitutional. *Id.* at 8.

Under our system of criminal justice the prosecution bears the burden of proof not the defendant. *In re Winship*,

397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An evidentiary rule that requires a defendant to demonstrate to the trial court "clearly and convincingly" that a complaining witness made prior false accusations of a similar offense before the defendant may have any opportunity to cross-examine the complaining witness about those prior accusations creates an unduly high barrier against the defendant's presentation of probative evidence.[5] The nature of the evidentiary burden imposed here is particularly onerous where the defendant has evidence that the complaining witness has made multiple prior accusations of similar offenses and the state court has found those accusations false to a reasonable probability. The finder of fact must be entrusted to be able to determine the credibility of the complaining witness under such circumstances. The stated purpose behind New Hampshire's evidentiary rule, namely preventing a "trial within a trial," *see White*, 145 N.H. at 548, 765 A.2d at 159, is disproportionate to the purpose that it is intended to serve as the trial court could have constrained White's presentation of evidence to the complaining witnesses' testimony. Because New Hampshire's exclusionary rule is disproportionate to its intended purpose, it violates the defendant's constitutional rights. *See United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998); *Michigan v. Lucas*, 500 U.S. 145, 151, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991); *Rock v. Arkansas*, 483 U.S. 44, 55-56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

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[5] In a somewhat analogous context, the Supreme Court found that a state law requiring a criminal defendant to stand trial unless he proves to the trial court by clear and convincing evidence that he is incompetent violated the due process clause. *Cooper v. Oklahoma*, 517 U.S. 348, 368-69, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996).

In light of the foregoing, this Court finds that where White presented evidence that the complaining witnesses engaged in a pattern of making false allegations of similar offenses against others, and where the state court found that White demonstrated the falsity of those prior allegations to a reasonable probability, it was unreasonable under the Sixth Amendment for the state court to deny White *any opportunity* to cross-examine the complaining witnesses regarding those prior accusations at his criminal trial. Therefore, the Respondent's motion for summary judgment is denied. The Court further finds that the state court's constitutional error was not harmless because there is no dispute that the testimony of the complaining witnesses was critical to the prosecution's case, and because the evidence sought to be introduced would not have been cumulative. *See Van Arsdall*, 475 U.S. at 678, 106 S.Ct. 1431 (finding that constitutional challenges pertaining to the improper denial of a defendant's opportunity to impeach a witness for bias is subject to harmless error analysis). Therefore, the Court grants White's petition for a writ of habeas corpus.

Conclusion

For the reasons set forth above, Respondent's motion for summary judgment (document no. 6) is denied. The petition for a writ of habeas corpus (document no. 1) is granted. The Respondent is ordered to release White unless the state vacates his convictions and affords him a new trial within 90 days.

SO ORDERED.

APPENDIX E

New Hampshire Supreme Court

THE STATE OF NEW HAMPSHIRE

v.

DELVIN WHITE.

No. 97-412.

December 27, 2000.

Philip T. McLaughlin, attorney general (N. William Delker, attorney, on the brief and orally), for the State.

Behzad Mirhashem, assistant appellate defender, Concord, by brief and orally, for the defendant.

BRODERICK, J.

The defendant, Delvin White, appeals his convictions following a jury trial of one count of aggravated felonious sexual assault, *see* RSA 632-A:2, II (1996) (amended 1997, 1998, 1999), and two counts of felonious sexual assault, *see* RSA 632-A:3 (1996) (amended 1997). He contends that the Superior Court (*Barry*, J.) erred by: (1) excluding the victims' prior allegations of sexual assault against other individuals; (2) admitting hearsay statements by the victims to an emergency room physician; (3) excluding evidence that the victims had previously been placed in foster care; and (4) sentencing him to an extended term of incarceration under RSA 651:6 (1996) (amended 1996, 1997, 1998, 1999). We affirm the defendant's convictions, vacate the sentence, and remand for resentencing.

The following facts were either adduced at trial or are undisputed. In March 1996, the defendant spent an afternoon visiting a friend and his girlfriend at their

apartment in Manchester. The friend had two daughters, ages twelve and eight, and the girlfriend had two sons, all of whom were together at the apartment that day. After spending the afternoon playing cribbage, listening to the radio, and drinking beer with his friend, the defendant accepted an invitation to stay for dinner. It was later agreed that he would spend the night.

At trial, the younger daughter testified that while she sat with the defendant on a day bed watching television, he rubbed her breasts, put his hands down her pants, and "stuck his finger in." When the daughter told her father what had happened, he attacked the defendant. During this confrontation, the older daughter came out of a bedroom crying hysterically. She later related that earlier that same day the defendant had touched her breasts, her vaginal area, and inserted his finger in her "private." As the confrontation between the father and the defendant continued, the father's girlfriend took all of the children to a neighbor's apartment and called the police. After an investigation, the police told her to take the victims to the hospital for a physical examination, and she did so.

The defendant was convicted of aggravated felonious sexual assault against the older child and one count of felonious sexual assault against each child. This appeal followed.

I

The defendant argues that the trial court erred in excluding evidence of the victims' prior allegations of sexual assault against other individuals. He contends that these prior allegations were false, and therefore admissible to impeach the victims' credibility. *See* N.H. R. Ev. 608(b).

"The admissibility of evidence is a matter within the trial court's broad discretion, and we will not upset [its] ruling absent an abuse of that discretion." *State v. Dewitt*, 143 N.H. 24, 26-27, 719 A.2d 570, 572 (1998). Here, the probative value of the victims' prior allegations of sexual assault against other individuals depends upon their truthfulness. If the prior allegations were false, they would adversely affect the victims' credibility. *See State v. Dukette*, 127 N.H. 540, 549, 506 A.2d 699, 706 (1986). The trial court refused to admit the prior allegations, however, because the defendant "failed to persuade [it] that any of [the victims'] prior allegations ... were demonstrably false." We must first decide whether "demonstrably false" is the proper standard to be applied. *Cf. State v. Walters*, 142 N.H. 239, 242, 698 A.2d 1244, 1246 (1997) ("The party offering evidence generally bears the burden of demonstrating its admissibility.").

The defendant argues that a less stringent standard controls, asserting that prior allegations of sexual assault should be admitted if there is a "reasonable probability" they are false. *See Clinebell v. Com.*, 235 Va. 319, 368 S.E.2d 263, 266 (1988). We disagree. This standard, if adopted, could "divert the attention of the trial from its primary objective [of] determini[ng] ... the guilt or innocence of [an] accused ... [and] in effect [put] the complainant on trial as to the truthfulness of any complaint [of sexual assault]." *State v. Johnson*, 102 N.M. 110, 692 P.2d 35, 43 (Ct.App.1984), *overruled in part on other grounds by Manlove v. Sullivan*, 108 N.M. 471, 775 P.2d 237 (1989).

The State invites us to adopt the "demonstrably false" standard, but to construe it as meaning false "in fact." *See, e.g., State v. Hutchinson*, 141 Ariz. 583, 688 P.2d 209, 212-13 (Ct.App.1984); *Com. v. Bohannon*, 376 Mass. 90, 378

N.E.2d 987, 991 (1978). The pitfall of this heightened approach is that there are few, if any, situations where the standard could be met, other than where the victim testifies to the falsity of the prior allegations. Accordingly, we reject the State's invitation. Instead, we hold that the trial court correctly determined that a defendant may introduce a victim's prior allegations of sexual assault by showing that the prior allegations were demonstrably false, which we interpret to mean "clearly and convincingly untrue." This approach requires greater proof of falsity than the "reasonable probability" standard proposed by the defendant, but less certitude than the "false-in-fact" test offered by the State. It also ensures that there will not be a "trial within a trial" on evidence ultimately excluded while still allowing a defendant the opportunity to present relevant evidence.

A

We must now decide whether the trial court properly applied the standard. Both victims previously accused a neighbor of committing sexual assault, but he was eventually acquitted of the charges. The defendant contends that the acquittal, in conjunction with other proffered evidence, satisfies his proof. We disagree. While an acquittal is strong evidence that the jury may have found a victim's allegations to be unreliable, an acquittal, by itself, does not necessarily clearly and convincingly demonstrate that the victims were lying about the assaults. Rather, an acquittal merely means that the State failed to carry its burden of proving beyond a reasonable doubt one or more elements of the charged crime. *See United States v. Kerley*, 643 F.2d 299, 300-01 (5th Cir.1981). Such failure can

result from a variety of factors. *See United States v. Hernandez*, 146 F.3d 30, 33 n. 1 (1st Cir.1998).

The defendant also relies on testimony at the neighbor's trial from the victims' babysitter and their mother's then boyfriend as elements of the clear and convincing proof of the falsity of the older victim's prior allegation of sexual assault. The babysitter testified that she heard the older victim tell her mother that her accusations were not true. The former boyfriend testified that the older victim told him she was lying when she accused the neighbor of sexual assault. The trial court in the present case, however, was not persuaded by the babysitter's testimony because it did "not find [her] testimony credible given the State's offers of inconsistency and questionable credibility." The defendant contends that the trial court erred by taking the issue of the babysitter's credibility from the jury, instead relying on the State's "unsubstantiated" proffer to determine the babysitter's threshold credibility.

We agree that credibility is normally a matter for the trier of fact. *See State v. Lowe*, 140 N.H. 271, 275, 665 A.2d 740, 743 (1995). The trial court, however, must make an initial determination of credibility or else risk admitting evidence of prior allegations without a showing that they are demonstrably false, resulting in a "trial within a trial" and confusing the jury. *See* N.H. R. Ev. 104(a); *State v. Alexander*, 143 N.H. 216, 221-22, 723 A.2d 22, 26 (1998). At the hearing on the defendant's motion *in limine*, the State proffered that the babysitter was unreliable, stating that she had provided "multiple statements" concerning the older victim's allegations, including statements that she could not remember the pertinent events. The State contended that her memory loss was due to, *inter alia*,

cocaine addiction. "We [have previously] acknowledge[d] that a proffer of evidence presents a great[] risk of an erroneous pretrial ruling." *State v. Haley*, 141 N.H. 541, 544, 689 A.2d 671, 674 (1997). Here, however, the trial court had not only the State's proffer, but also the entire transcript of the babysitter's testimony from the neighbor's trial. Although we do not have the entire transcript before us, we do have portions which suggest a possible bias on the part of the babysitter in favor of the neighbor accused of sexual assault. We assume that the trial court examined the entire transcript before deciding that the defendant had not shown the prior allegations of sexual assault to be demonstrably false. *See Brown v. John Hancock Mut. Life Ins. Co.*, 131 N.H. 485, 492-93, 558 A.2d 822, 826 (1989). We cannot say, therefore, that the trial court abused its discretion in finding that the babysitter's testimony at the neighbor's trial did not satisfy the defendant's burden of establishing falsity.

The trial court also excluded the former boyfriend's testimony that the older victim had recanted her accusations of sexual assault against the neighbor because the "recantation was made under circumstances akin to duress or coercion." The defendant challenges this decision because the former boyfriend "testified at [the neighbor's] trial that the recantation did not result from any coercion." Notwithstanding this testimony, the trial court could have reasonably found, based on the transcript of the former boyfriend's testimony, that he was in fact coercing the older victim to recant. *Cf. State v. Berry*, 117 N.H. 352, 355, 373 A.2d 355, 357 (1977) (conflicts in evidence for trier of fact).

The defendant next alleges that the older victim's prior allegations against her cousin of sexual assault

should have been admitted. He relies upon the fact that the police closed their investigation into the alleged assault due to reasonable doubt. Further, the babysitter had testified during the neighbor's trial that the older victim admitted to her that she lied in accusing her cousin of assault. The failure of the police to arrest due to lack of probable cause does not demonstrate clearly and convincingly the falsity of the allegations. *Cf. Com. v. Hicks*, 23 Mass.App.Ct. 487, 503 N.E.2d 969, 972-73 (1987) (that charges were dropped at the request of the victim not a sufficient basis for inferring that those charges were false). For the reasons discussed earlier, we find that the trial court did not abuse its discretion in finding the babysitter's testimony lacking in credibility. Accordingly, the trial court did not err in excluding evidence of the older victim's prior allegations against her cousin.

The defendant also contends that the older victim's prior allegation of sexual assault against an individual named "Mac" or "Uncle Mack" should have been admitted to impeach her credibility. The defendant points only to the fact that the "police were unable to identify 'Mac'" as evidence that the allegation was false. We note that the statement that the police were "unable to identify any person with the first name of Mac (last name unknown)" was contained in an investigative report on the older victim's allegations of sexual assault against her cousin. Further, the older victim's allegation against her cousin also included her belief that "Mac" or "Uncle Mack" was now deceased. The failure of the police to identify the alleged perpetrator of one sexual assault while investigating a different sexual assault, when the police have only a first name and the alleged perpetrator is reportedly

deceased, does not demonstrate clearly and convincingly that the older victim was lying about the assault.

Finally, the defendant argues that the younger victim's prior allegations of sexual assault against the neighbor were false because her description of the assault varied over the course of a year. Her story did, however, remain consistent about where she was touched. The State contends that the defendant did not preserve this argument for appeal. Assuming, without deciding, that this issue was properly preserved for appeal, we do not find an abuse of discretion in the trial court's finding. That a five-year-old child's story concerning an alleged sexual assault varied somewhat over the course of one year concerning one aspect of the assault did not demonstrate clearly and convincingly that the allegations were false. *See State v. Cressey*, 137 N.H. 402, 411-12, 628 A.2d 696, 702-03 (1993).

We find no error by the trial court in denying the admission of these individual pieces of evidence as to the falsity of the prior allegations. Consequently, we reject the defendant's argument that the cumulative effect of the prior allegations demonstrated their falsity. *See State v. Smart*, 136 N.H. 639, 669, 622 A.2d 1197, 1216 (1993). Here, the whole is simply not greater than the sum of its parts. Although the number of prior allegations made by the victims in this case may give pause, a contrary holding would mean that even if a defendant failed to demonstrate clearly and convincingly that discrete prior allegations were false, he could still introduce them by merely pointing to their sheer number. If, as argued by the defendant, the correct standard for admissibility of prior allegations were "reasonable probability of falsity," we agree that the defendant would have met that standard in this case.

Where the proper standard is "demonstrably false," however, and where the defendant must introduce evidence which "clearly and convincingly" shows the prior allegations to be demonstrably false, the defendant has simply not met this higher standard. While the quantity of evidence may be of some value, it is the quality of that evidence that is paramount. Here, had the defendant's pieces of proffered evidence been of a higher quality, the defendant may very well have met the "demonstrably false" standard. Given the questionable nature of the evidence presented, however, the defendant's motion must fail.

B

Alternatively, the defendant argues that the prior allegations were admissible to show the victims' prior sexual knowledge. The defendant contends that the older victim's allegations against "Mac" and the younger victim's allegations against the neighbor were sufficiently similar to their allegations against the defendant to be admissible to show an alternative source for the victims' sexual knowledge.

"Trial courts have broad discretion in determining the scope of cross-examination and we will not overturn the trial court's ruling absent an abuse of that discretion." *State v. Ellsworth*, 142 N.H. 710, 720, 709 A.2d 768, 774 (1998) (quotation omitted). Prior sexual assault can be relevant to demonstrate that the victims' knowledge came not from the charged acts, but from prior sexual assault inflicted by another. *See id.*

We agree that similarities exist between the prior allegations and the allegations at issue in this case. At the

hearing on the defendant's motion *in limine*, however, the State presented testimony from the victims' pediatrician and social worker to demonstrate that the source of their sexual knowledge was not from earlier sexual assaults, but was from counseling and physical examinations.

The victims' pediatrician had given them physical examinations since 1993. The doctor testified that she told them that certain parts of their bodies are special and asked them what they would do if anyone ever touched them there. She then testified that she told the victims

> [T]hat is your own special place. Nobody has a right to touch you down there with their fingers or with their penis and if this were to occur, then it is your right to say, get away from me and I'm going to go tell so and so.

The social worker testified that she had conversations with the victims about sexual victimization, "good touching" versus "bad touching," and "that there are certain things that nobody should be doing with them." She instructed them regarding "[w]hat the certain parts of their body are that are private." Given the knowledge that the victims obtained from the pediatrician and the social worker, we cannot conclude that the trial court abused its discretion in finding the proffered evidence inadmissible because the victims' prior knowledge could have been derived from these sessions and not from prior sexual assault. *See id.* at 721, 709 A.2d at 775.

The defendant contends that although the trial court may have satisfied itself that the victims obtained their sexual knowledge elsewhere, the jury did not know this because the trial court did not require the State to present this testimony. The trial court's initial order on the

admissibility of the prior sexual assaults did appear to require the State to present the testimony of these two witnesses in order to establish alternative means for the victims' prior sexual knowledge. The trial court, however, clarified its order, stating

> Just to make that clear, when I wrote that, I anticipated that the defense was going to mount a challenge as to the sexual knowledge of these girls and how it was obtained, that's why I said that. It wasn't creating an unequivocal burden for the State to meet in addition to proving each one of the allegations beyond a reasonable doubt.

The State had no duty to present these witnesses; it was simply required to prove each element of the crime charged beyond a reasonable doubt. *See State v. Parker*, 142 N.H. 319, 322, 702 A.2d 306, 308 (1997).

C

The defendant argues that his right to present all favorable proofs under Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution was violated by his inability to impeach the victims' credibility by using their prior allegations of sexual assaults. "The New Hampshire Constitution is at least as protective as the Federal Constitution in this area, and we therefore decide this case under the State Constitution, employing federal cases to aid in our analysis." *State v. Graf*, 143 N.H. 294, 296, 726 A.2d 1270, 1273 (1999) (quotation omitted). "Both the Compulsory Process Clause of the Federal Constitution and the right to produce all favorable proofs under Part I, Article 15 give a defendant only the right to produce witnesses, not to produce their testimony." *Id.* The defendant does not argue

that he was prevented from producing the victims as witnesses, therefore his argument that the trial court violated his right to present all favorable proofs is without merit. *See id.*

The defendant also contends that the trial court violated his State and Federal constitutional due process rights and right to confront witnesses by not permitting him to cross-examine the victims regarding their prior allegations. We will first address the defendant's claim under the State Constitution, *see State v. Ball*, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983), and will engage in a separate federal analysis only if federal law is more favorable. *See State v. Seymour*, 140 N.H. 736, 742, 673 A.2d 786, 791 (1996).

We previously have found no State constitutional violation in the context of Rule 608(b) where "the defendant has failed to make a threshold showing of probity and similarity." *Ellsworth*, 142 N.H. at 719, 709 A.2d at 774. In the instant case, the prior allegations of sexual assault are not probative of the victims' motives because, as discussed above, the defendant has failed to demonstrate clearly and convincingly that the prior allegations are false. Because federal law does not provide any additional protection in this area, we need not undertake a separate federal analysis. *See id.* at 719-20, 709 A.2d at 774; *Clinebell*, 368 S.E.2d at 266 (while Sixth Amendment of Federal Constitution gives the defendant the right to cross-examine complainant about prior allegations, the defendant must still demonstrate that the prior allegations were false).

II

The defendant next challenges the testimony of the emergency room physician who examined the children and recounted what each said about the assaults. Specifically, the doctor said both children told him that a male house guest "put his hand down in [their] shirt[s] and had his hand in [their] pants." The defendant contends that this testimony was inadmissible hearsay because the victims' statements: (1) were not made with the intent of receiving medical diagnosis or treatment; (2) were not reasonably pertinent to a medical diagnosis or treatment; and (3) were not made under circumstances indicating that the statements were trustworthy.

New Hampshire Rule of Evidence 803(4) excepts from the hearsay rule

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances indicating their trustworthiness.

The trial court's preliminary factual determinations for admissibility under Rule 803(4) will be upheld unless clearly erroneous, *see State v. Roberts*, 136 N.H. 731, 738-40, 622 A.2d 1225, 1230-32 (1993), and absent an abuse of discretion, we will uphold the trial court's determination that Rule 803(4) evidence should be admitted. *See State v.*

Young, 144 N.H. 477, ___, 743 A.2d 1275, 1280 (1999); *United States v. Bailey*, 581 F.2d 341, 346 (3d Cir.1978).

"We examine three areas of inquiry in determining the admissibility of evidence under Rule 803(4): the declarant's intent; the subject matter of the statements; and whether there are circumstances indicating the trustworthiness of the statements." *Graf*, 143 N.H. at 303, 726 A.2d at 1277-78 (quotation omitted).

We first address the intent of the two children in making the statement to the examining emergency room physician. When the declarant is a child, "[t]he proponent of Rule 803(4) statements must present evidence establishing that the child had the requisite intent, by showing that the child made the statements understanding that they would further the diagnosis and possible treatment of the child's condition." *Id.* at 303-04, 726 A.2d at 1278 (quotation omitted). While we have required affirmative evidence on the record of a child declarant's intent, *see State v. Wade*, 136 N.H. 750, 755, 622 A.2d 832, 835 (1993), this intent can be established by circumstantial evidence. *See Lowe*, 140 N.H. at 273, 665 A.2d at 742. Express testimony from the victims about their intent is not necessary. *See Graf*, 143 N.H. at 303-04, 726 A.2d at 1278.

The defendant contends that the State failed to establish that the victims possessed the requisite intent because they were told by the doctor that the examination was done to prepare an evidence kit. The mere fact that the doctor explained that he was going to examine and collect evidence for an evidence kit does not mean that the victims did not also understand that the doctor was going to treat them. After hearing the complaints of the victims, the doctor conducted an examination that had the dual

purpose of treatment and evidence collection. When determining a child's intent, one must look at all the surrounding facts and circumstances. *See State v. Stinnett*, 958 S.W.2d 329, 331 (Tenn.1997). The victims were taken to the hospital hours after the defendant allegedly assaulted them. The older victim complained of pain and the younger victim was visibly upset as a result of the alleged assaults. The temporal proximity between the victims' complaints, their emotional upheaval, and the visit to the hospital supports a finding that the victims knew the reason for the visit related to their physical and emotional health. *See Lowe*, 140 N.H. at 273-74, 665 A.2d at 742. At their respective ages, the victims would have understood that the purpose of a hospital emergency room is medical treatment. *See Stinnett*, 958 S.W.2d at 332. Unlike the circumstances present in *State v. Woods*, 130 N.H. 721, 729, 546 A.2d 1073, 1078 (1988), there was no evidence here that the sole purpose of the examination was to collect evidence. Therefore, the trial court did not abuse its discretion in finding that the victims' statements were made with the intent of receiving medical treatment.

The defendant next argues that the victims' statements about the assaults were not pertinent to medical diagnosis or treatment. This argument is without merit. As the doctor testified, the victims' descriptions of the assaults structured the physical examination. *See People v. McElhaney*, 215 Mich.App. 269, 545 N.W.2d 18, 26 (1996). Depending on the nature of the sexual assault inflicted on the victims, the doctor would have treated them for different ailments and possible diseases. Therefore, the victims' complaints were in fact pertinent to medical diagnosis or treatment. *See State v. Kay*, 129 Idaho 507, 927 P.2d 897, 909 (Ct.App.1996).

The defendant also contends that the trial court erred in admitting the doctor's testimony because there were no circumstances indicating that the victims' statements were trustworthy. We have held that statements made to a physician are trustworthy, in part, because of the duration of the relationship between the doctor and patient. *See Lowe*, 140 N.H. at 275, 665 A.2d at 743. That does not mean, however, that the victims' statements here are untrustworthy merely because the victims had not been seen previously by the emergency room doctor. The doctor interviewed the victims separately. Both victims cooperated with the examinations, *see Graf*, 143 N.H. at 304, 726 A.2d at 1278, and answered questions on their own without prompting. The doctor testified that the victims maintained good eye contact with him. Although their father's girlfriend was present, the victims were neither prompted by her nor did they look to her for answers to the doctor's questions. Accordingly, we conclude that the trial court's determination that the doctor's testimony met the three prongs of Rule 803(4) was not clearly erroneous. Therefore, the trial court did not abuse its discretion in admitting the doctor's testimony under Rule 803(4).

III

The defendant alleges that the trial court erred by excluding evidence that the victims had previously been placed in foster care. Part of the defendant's theory as to why the victims were motivated to fabricate the allegations of assault was because they were afraid that their father, who had been incarcerated as a habitual offender, would be imprisoned again as he had resumed drinking, resulting in another foster care placement for the victims. On the day of the sexual assaults, the victims' father and

the defendant drank a case of beer together. The court admitted evidence of the father's previous incarceration after finding that there was "a nexus between [the father's] incarceration and the defendant's claim that the children fabricated the charges against [him] to get attention so that [their father] would stop drinking." The court excluded evidence of the victims' previous placement in foster care because it did not find the existence of a similar nexus.

"The determination of the relevance of evidence is a matter for the trial court's sound discretion, and we will not overturn such a determination absent an abuse of discretion." *State v. Graham*, 142 N.H. 357, 362, 702 A.2d 322, 325 (1997). In order to demonstrate an abuse of discretion, the defendant must show that the court's decision "was clearly untenable or unreasonable to the prejudice of his case." *Id.* (quotation omitted). There was no evidence that the victims feared their father's renewed drinking would result in another foster care placement. When the victims had been placed in foster care previously, their mother was a drug user and unable to care for them. At the time of the sexual assaults, the father had resumed drinking approximately four months earlier, but the mother no longer used drugs and she had custody of one of the victims. The father's drinking, therefore, was unlikely to lead to their renewed placement in foster care. We cannot say that the trial court abused its discretion by excluding evidence of the victims' previous foster care placement after finding no nexus between the foster care placement and a motive to fabricate the charges of sexual assault.

IV

Finally, the defendant contends that the trial court erred in sentencing him to an extended term under RSA 651:6, I(c), II(d) (1996). The State concedes that this was error. We therefore vacate the sentence and remand for resentencing.

Convictions affirmed; sentence vacated; remanded for resentencing.

JOHNSON, J., sat for oral argument but retired prior to the final vote;

THAYER, J., sat for oral argument but resigned prior to the final vote;

BROCK, C.J., concurred;

HORTON, J., retired, specially assigned under RSA 490:3, concurred.

APPENDIX F

United States Court of Appeals
For the First Circuit

No. 04-1044

DELVIN WHITE
Petitioner – Appellant

NEW HAMPSHIRE ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
Amicus Curiae

v.

JANE COPLAN, Warden, NH State Prison
Respondent – Appellee

Before:
Boudin, *Chief Judge*,
Torruella, Selya, Lynch, Lipez, *Circuit Judges*,
Saris, *District Judge*.

ORDER OF COURT

ENTERED: March 25, 2005

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the

petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

S/ _____
Richard Cushing Donovan
Clerk